

B. R. d.

TREATISE  
ON THE  
REVOCATION AND REPUBLICATION  
OF  
WILLS AND TESTAMENTS:  
TOGETHER WITH  
TRACTS UPON THE LAW  
CONCERNING  
BARON AND FEME.

INCLUDING  
CURTESY, DOWER, JOINTURES, || LEASES, SETTLEMENTS, SEPARATION,  
DISCONTINUANCES, &c.

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BY R. S. DONNISON ROPER, ESQ. R  
OF GRAY'S INN, BARRISTER AT LAW.

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## ADVERTISEMENT.

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IN a science so various and complicated as the present system of the Law, nothing which tends to facilitate the progress of the student, or abridge the labours of the practitioner, can be deemed useless. And to deduce with accuracy and arrange in order the general principles on any important subject, defining also the minute shades of distinction, arising from the decisions, which on any single head of our laws amount to an almost infinite multiplicity, would not, it is presumed, be unacceptable to the public and the profession, who know justly to appreciate the advantage, the labour, and the difficulty of the undertaking.

This task the Author has attempted in the following pages, on two leading articles and their subordinate divisions, with a view to assist others in a path which experience has proved arduous, but whether with inefficacy or success he must leave to the judgment, while he hopes for the indulgence, of the members of the profession, for the use of

whom it is intended. Their well known candour he has already experienced in a former Treatise on Legacies, written upon a similar plan; and their approbation he has sought by the choice of subjects of frequent occurrence in practice: and by endeavouring in the manner of his former work, to give to his pages the simplicity and clearness of an elementary treatise, which the student may peruse with facility; and the comprehension and arrangement of a digest, which those engaged in practice may readily consult with little expence of time. For this purpose he has generally extracted the principles of the law, referring to the cases from which the axioms and distinctions are derived without abstracting them, except where a brief statement appeared necessary to illustrate the subject.

## ERRATA.

Page 160, line 9, insert *&* after "and."

165 — 10, for *is* read *are*.

176 — 6, for "Feme-Discontinuors" read *Femes-Discontinuors*.

ON THE REVOCATION OF WILLS  
AND TESTAMENTS.

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IN treating upon the law of revocations of wills and testaments, I shall consider the subject:

**FIRST**—With regard to changes of interest in the lands devised, prior to the testator's death, including revocations by operation of law *independent of intention*; and revocations by implication, in which *intention is necessary*.

**SECOND**—In relation to express revocations, including revocations by subsequent wills and codicils; and revocations by canceling, tearing, and obliterating, &c.

1. *Revocations by change of interest in the lands devised, prior to the testator's death, effected by operation of law independent of intention.*

No will or testament is of any effect during the life of the person making it, “*omne testamentum morte consummatum est, et voluntas testatoris*”

*tatoris est ambulatoria usque ad mortem*" (a); therefore the last will or testament will annul all the former (b).

It is essential to the devise of real estate, that the testator have a present interest capable of disposition, and a continuance of it to the period of his death (c). A devise of freehold lands by will operates as an appointment of the person to take the specific estate, whence it follows, that if the testator afterwards convey away the estate entirely, the devise of it will be defeated, and *that* whether he take it back again by the same instrument or by a declaration of uses. Revocations of this kind not depending (as before observed) upon the intention of testators, but on the positive rule of law, which declares, that such an alteration of the testator's interest subsequent to the date of his will, shall create a revocation of it: thus, if A. after making his will, suffer a recovery, levy a fine, or convey away his estate by lease and release, the devise will be revoked both at law and in equity, although the use may result, or be limited to A. To this purpose the following list of authorities is applicable, (d) *Lannoy v. Lannoy*, (e) *Lord Lincoln's case*, (f) *Martin v. Savage*, (g) *Bur-*

(a) *Co. Litt.* 112. b.

(b) *Perk.* pl. 478.

(c) *Fitzg.* 240. 241.

(d) *Sel. Ca. Ch.* 48.

(e) 1 *Eq. Ca. Abr.* 411. (f) 3 *Barnard* 189. (g) 1 *Atk.* 576.

goigne *v.* Fox, (h) Bennet *v.* Vade, (i) Darley *v.* Darley, (k) Hick *v.* Mors, and the several other cases referred to in the notes (l).

It must however be understood, that the subsequent transactions are not tainted with fraud or dures so as to vitiate them at law, for a void instrument cannot revoke a will. (m) Hawes *v.* Wyatt, and (n) Clymer *v.* Littler.

Although the above rule has been strictly pursued by courts of law, they have admitted exceptions to it in a few instances.

One exception is in cases of *partition* between coparceners or tenants in common, for if a partition be completed between the parties by deeds and fine, a prior will of an undivided moiety will not be revoked by the subsequent transaction; and, (as I conceive) upon this reasoning, that the deeds and fine are considered as merely *ancillary* to a partial purpose, viz. completing the partition, and as not affecting the quantity, but the *quality* only of the estate; (o) Risley *v.*

(b) 2 Atk. 324. (i) 3 Wils. 6. 7. Bro. Parl. Ca. 177. S. C.

(k) Ambl. 215. (j) Dyer. 143. b. Moor. 789. 3 Lev. 108.

3 P. Will. 165. 3 Atk. 741, 798. 1 Bro. C. C. 401.

(m) 3 Bro. C. C. 156. (n) 3 Burr. 1244—1255.

(o) Raym. 240.

Baltinglass, (p) Webb *v.* Temple, and (q) Luther *v.* Kirby.

A second exception is applicable to *mortgages* effected after the making of wills. Mortgages for terms of years are at law revocations only *pro tanto*; and although mortgages in fee are legal annulments of prior devises, they will not be allowed the same effect in equity, and *that* from the nature and intent of the transaction. A mortgage in fee being considered by the latter tribunal, a conveyance only for a particular purpose, a pledge and security for money advanced, and notwithstanding the transfer is of real estate, yet it is enumerated amongst *chattel* interests. (r) Hall *v.* Dunch, and the other cases referred to in the notes (s).

By analogy of reasoning to mortgages, a *third* exception arises, viz. *conveyances for payment of debts*, when the surplus results, or is expressly reserved to the person who makes it. Subsequent conveyances for these purposes are no revocations of prior testamentary dispositions, except to the amount of the debts to be paid. (t) Ogle *v.* Cook, (u) Vernon *v.* Jones, and (x) Dixon *v.* Gisborne, cited in Williams *v.* Owen.

(p) Freem. 542.

(q) 3 P. Will. 170. in Notes, 5 Ed. (r) 1 Vern. 329, 342.

(s) Ibid. 97, 141, 182. 1 Salk. 158.

(t) Referred to in 2 Ves. Jun. C. C. 423.

(u) 2 Vern. 241. Pre. Ch. 32. S. C. (x) 2 Ves. Jun. 602.

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The above are the only *three* exceptions which have been allowed to the general rule before stated. In the case of (*y*) *Cave v. Holford*, sent to the Common Pleas from the Court of Chancery, one of the questions was, The effect of a conveyance by lease and release to revoke a prior will, by which the lands devised were transferred to trustees and their heirs to the use of *A.* until the solemnization of his intended marriage, and then to the same trustees for a term of years, to secure an annuity to his intended wife in bar of dower, with remainder to the use of *A.* in fee: although it was apparent that the conveyance by *A.* was made with the sole intent to provide a jointure for his intended wife, yet it was adjudged by *Rooke, Heath, and Buller, justices, Eyre, C. J.* *dissentiente*, that such conveyance was a revocation of *A.*'s will, so far as related to the estates comprised in the indentures of lease and release: which judgment was afterwards unanimously affirmed on appeal to the Court of King's Bench.

Although the conveyance of the devised estate be for any of the partial purposes before-mentioned, which are not allowed to create a total revocation of a prior disposition by will, (the end proposed and not the means of effecting it being alone considered;) yet, if the *in-*

(*y*) *2 Ves. Jun. C. C. 694. Note, and vol. 3, page 650.*

terest of the settlor be *new-modelled* or *abridged* by the subsequent transaction, the devise will be revoked: and it seems upon the principle, that an inference arises from the insertion of new uses or trusts, that the person making the conveyance intends the whole estate to pass and be enjoyed under the latter instrument (z.) Thus *A.* being seized in fee with *B.* of lands in *gavelkind*, devised his undivided moiety to *C.* and afterwards by deed of partition between *A.* and *B.* and fine, the estate which *A.* devised was allotted to him *to such uses as he should by deed or writing appoint*, and in default of appointment to *A.* in fee. The abridgement of *A.*'s interest, which at the making of his will was absolute, was considered by Lord Loughborough in (a) *Bridges v. Chandos*, and by Lord Hardwicke in (b) *Parsons v. Freeman*, as altering the *nature of the transaction beyond the particular purpose of partition*, and therefore was the cause of revocation, as adjudged in the case of (c) *Tickner v. Tickner* just stated.

If the instrument be *complete*, but rendered inoperative from the *incapacity of the persons to take who were intended to be benefited*, the prior disposition will nevertheless be defeated, and for this reason, because the act being sufficient to

(z) 1 *Roll. Abr. Tit. (Dev.)* page 616. pl. 5.

(a) 2 *Ves. Jun. C. C.* 417. (b) 3 *Atk.* 741.

(c) Cited in *Parsons v. Freeman*, *Ibid.* p. 742. 3 *Wils.* 308. S. C.

change and alter the testator's interest, creates a legal revocation which cannot be defeated by parol evidence. Thus in a case where a wife claimed under a grant from her husband, it was determined, that although the gift could not take effect from the wife's disability to take immediately from the Baron, yet the deed should revoke a prior disposition of the property by will. *Beard v. Beard* (*d*). And for the like reason, if a subsequent devisee were incapable to take for his own benefit, although the second disposition be disappointed, yet it will effect a revocation. *Roper v. Constable* (*e*).

If a testator be *disseised* after making his will, and *die before re-entry*, the disseisin will be a revocation (*f*).

In the construction of revocations, the Court of Chancery has frequently avowed, that when the interest devised is purely equitable, the same decision would be made in that court, as at law, provided the subject had been within the jurisdiction of a court of law, establishing it as a rule that there is no difference between legal and equitable revocations, except only in those instances when the transaction is considered by the two tribunals in different views, as in the above cases of mortgages in fee, and convey-

(*d*) 3 Atk. 72.      (*e*) 2 Eq. Ca. Abr. 359. pl. 9.

(*f*) 1 Roll. Abr. 616. Tit. Devise S. pl. 25.

ances for payment of debts. Therefore, if *A.* after making his will, covenant for a valuable consideration to convey the devised estate to *B.*, although *A.* happen to die before the contract is executed, yet the covenant will revoke the prior disposition, and upon this principle, whatever is agreed to be done is considered in equity as actually completed; therefore as at law, if the covenant had been performed during the testor's life, a revocation of the will must necessarily have followed, *pari ratione* the covenant shall have the same effect in equity. (g) *Rider v. Wager*, (h) *Cotter v. Layer*.

When a person possessed of an *equitable* interest *only*, devises it, and afterwards clothes that interest with the *legal* estate by taking a conveyance of it, the better opinion seems to be, that the subsequent transaction will not effect a revocation of the will. To this purpose Lord *Hardwicke* expressed himself in (i) *Parsons v. Freeman*. In (k) *Sparrow v. Hardcastle*, his lordship entertained a doubt of the opinion he incidentally gave in a former case; but Lord *Loughborough* in (l) *Brydges v. Chandos*, assents to the proposition as before stated, and cites a case determined at law in conformity with it. *Cestui que use* before the statute of uses devises:

(g) 2 P. Will. 329. (b) Ibid. 624.

(i) 3 Atk. 741. 3 Wils. 308. S.C. (k) 3 Atk. 799.

(l) 2 Ves. Jun. 429.

afterwards

afterwards the feoffees make a feoffment of the land to the use of the devisor; and after the statute the devisor dies, the lands shall pass by the devise, because after the feoffment, the devisor had the same use which he had before (m.)

In analogy to this reasoning, the case of (n) *Williams v. Owen* was decided at the Rolls. *A.* being seized of certain real estates, by articles made in consideration of his intended marriage, covenanted to convey them to trustees, to the use of himself for life, remainder to trustees in trust to secure an annuity for his wife for life in bar of dower, remainder to trustees for a term of years in trust to raise portions, remainder to the sons and daughters of the marriage successively in tail, remainder to his own right heirs: the marriage took effect, and *A.* afterwards by will, having charged the above estates with the payment of debts, devised them upon condition, that if he should have no issue, then to his wife for life, with several remainders over. *A.* after the date and execution of his will, conveyed all his real estates *in performance of the articles*, to trustees and their heirs, to the uses, and upon the trusts of the articles. And upon a question of revocation, the Master of the Rolls was of opinion, that as upon the solemnization of the marriage, the articles created a sort of equita-

(m) 1 Roll. Abr. 616. pl. 10. (n) 2 Ves. Jun. 595.

ble interest in the testator, the reversion in which was well disposed of by the will, his subsequent conveyance to the trustees, of the *legal* estate, by a conveyance of the *whole fee*, in performance of the articles, would not create a revocation of the will.

With every possible deference to the high authority which determined that case, it appears difficult to be reconciled with the principle of prior decisions upon revocations. In *Williams v. Owen*, the case just stated, *A.* the testator at the making of his will, was seized of the *legal* as well as the *equitable* estate; they had no separate existence, but were blended and indissoluble. *A.* being so seized, and after the execution of his will departed with the whole legal fee; it is obvious, therefore, that this subsequent transaction would create an actual revocation at law, and *that* notwithstanding it was done in performance of a prior engagement. Thus where *A.* in performance of a covenant entered into before his will, after the making of it levied a fine of the premises devised, such fine was adjudged a revocation of the intermediate will (o.) It may be alledged, however, that the conveyance being only for a partial purpose, and to give effect to the prior articles, the operation of it would be restrained in equity; but it appears that this reasoning must be imperfect, if the

(o) *Lutwitch v. Mitton.* Roll. Abr. 614. Tit. Devise, Q. pl. 40.  
proposition

proposition be true, that no difference exists between legal and equitable revocations, except where the two jurisdictions consider the transactions in different views; and that the rule is so in equity, is apparent from the cases of (*p*) *Brydges v. Chandos*, and (*q*) *Cave v. Holdford*; and there is no analogy between this case and that where the testator being possessed of the equitable interest, devises it, and afterwards takes a conveyance of the legal estate, it being obvious that in the latter no alteration is made in the testator's interest so as to disturb his will, and therefore no revocation created at *law*, but in the former a total change of interest is effected, productive of an actual legal revocation.

It was stated in (*r*) *Luther v. Kirby*, "that if *A.* devise lands, and levy a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable afterwards, such fine seemed to be a revocation; because a fine operated as such, from the *return* of the writ of covenant, and *not* from the *caption*." It seems, however, very doubtful whether such a case would receive a similar decision, since the opinion given by the judges in (*s*) *Selwyn v. Selwyn*; for that determination appears to have

(*p*) 2 Ves. Jun. 426. (*q*) 3 Ves. Jun. 650. 7 Term Rep. K. B. 399. 1 Bosanq. and Puller's Rep. C. P. 576. S. C. (*r*) 3 P. Will. 169. in notis. (*s*) 2 Burr. 1131.

established this proposition, that if the instrument creating a tenant to the *preceipe*, and declaring the uses to which the intended recovery shall enure, be executed and completed, and a will is afterwards made, but *before* the return of the *writ of covenant*, the recovery and deed shall be considered as *one indivisible conveyance*, and relate to the execution of the deed; so that the will being made posterior to it, will not be revoked by the recovery. This doctrine is applicable to all cases where the nature of the transaction admits an union of the several deeds constituting the whole. (t) *Ferrers v. Fermer*, and (u) *Noden v. Griffiths*.

2. *Revocations by implication, in which the intention is essential.*

Previous to the reign of Charles the second, wills and testaments in writing might have been revoked by pure parol declarations (x). The effects of such a doctrine were, as might reasonably be expected, that great impositions were practised by designing persons; that perjuries multiplied; solemn wills and dispositions often wrongfully defeated; and that litigations and animosities every where prevailed. To remedy those evils, the legislature found it necessary to

(t) *Cro. Jac. 643.* (u) *Blackst. Rep. 605.*

(x) *Ro'l. Abr. (Devise) O. 614. pl. 30.*

interpose;

interpose; it therefore declared “That no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some *other will* or *codicil in writing*, or *other writing*, declaring the same; or by *burning, cancelling, tearing, or obliterating* the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions, in manner aforesaid; or unless the same be *altered* by some other will or codicil in *writing*, or *other writing* of the devisor signed in the presence of *three* or more witnesses, declaring the same, any former law or usage to the contrary notwithstanding (y).” And moreover, “That no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed, by *any words*, or *will by word of mouth only*, except the same be in the life of the testator committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least (z).”

It has been determined, in the construction of the above statute, that revocations by *implica-*

(y) 29 Car. c. cap. 3. sect. 6. (z) Sect 22.

*tion* are not within its provisions; whence it follows, as a rule, that in all cases of implied revocations, when the intent to annul or defeat a prior will or disposition is ascertained, any act of a testator manifesting it, although incomplete, will be permitted to have that effect. In conformity with this proposition it has been adjudged, that the grant of a reversion upon an estate for life, where the lessee never attorns, is a revocation (a).—That a bargain and sale, *without inrollment*, will have the like effect (b).—And that a feoffment, *without livery*, will also revoke a prior will (c), *et sic de similibus* (d).

It is apparent, upon considering the above instances of implied revocations, that the subsequent acts of testators clearly evinced an intention inconsistent with the continuance of their testamentary dispositions, (viz.) in attempting to depart with the property previously devised; and it is to be observed, that it is requisite, in all cases of implied revocations, that the intention to revoke be plain and certain, and founded upon an *apparent inconsistency* between the will and subsequent transaction. As in those instances, where the uses or trusts limited by a second in-

(a) Arg. 2. Salk. 592. pl. 1. Roll. Abr. 615. pl. 30.

(b) Ibid. pl. 35. Wentw. Off. Ex. 22.

(c) 1 Blackst. Rep. 349. Moor. 429.

(d) 5 Term. Rep. K. B. 124. 310.

strument are contradictory to those expressed in the will. (e) *Brydges v. Chandos*, and (f) *Cave v. Holford*.

But if this obvious inconsistency be wanting, the second disposition will not defeat the prior. Thus, where *A.* devised his estate to trustees for 200 years, to pay his debts, and afterwards devised the lands by another will to the same trustees for 300 years, to discharge some particular debts by specialty, mentioned in a deed executed after the first will, and all incumbrances affecting the property; on a question, whether this subsequent transaction was a total revocation of the 200 years term? Lord Talbot was of opinion, that the latter term did not defeat the prior, as they were not inconsistent; his lordship conceiving, that *A.*'s intention in creating the 300 years term, was for the mere purpose of giving a priority in payment to the specialty debts, and the charges affecting the estate. (g) *Weld v. Acton*.

If the inconsistency between the prior and subsequent instruments or bequests be *partial only*, the revocation will extend no farther than to the limits of such inconsistency. Therefore,

(e) 2 Ves. Jun. 417. (f) Ibid. 604. note. & 3 vol. 650.  
(g) 2 Eq. Ca. Abr. 777.

if *A.* devise all his real estate to *B.* and afterwards, on *B.*'s marriage, settle a part of it upon *B.* as the settlement is not contradictory to the will for the residue of the property, the will shall take effect. (g) *Clarke v. Berkley.*

*Pari ratione*, the law is the same when the subsequent disposition is not commensurate in interest with that first devised (h), except only in those cases where the *devisee* is the person to whom the partial interest is given; for then, if the commencement of it be postponed to the testator's death, an intention is inferred from the inconsistency of the different interests which unite in the *devisee* at the same period, under the will and instrument creating them, that the testator meant to revoke the former *in toto*, so far as related to the *devisee*. Thus where *A.* devised lands to *C.* in fee, and afterwards demised them to him for 60 years, *to commence after A.'s death*, the lease was adjudged a revocation of the whole devise to *C.* (i) *Coke v. Bullock.*

A similar determination was made by Lord *Macclesfield* in (u) *Harkness v. Bailey*, where a

(g) 2 Vern. 720. 1 Eq. Ca. Abr. 412. S. C.

(h) Roll. Abr. 616. (U). Pl. 10.

(i) Eq. Ca. Abr. 410. Cro. Jac. 49. S. C. (u) Ch. Pre. 514

mortgage for a term of years was made by the testator to his devisee in fee. It seems, however, from the reasoning in the above case of *Coke v. Bullock*, that if the partial interest granted to a devisee, be provided to commence either in *presenti* or *futuro*, in the life of the testator, it will not effect a revocation by implication ; for such interest may possibly determine previous to his decease, so that the inference of an intention to revoke from apparent inconsistency totally disappears ; *cessante causa cessat effectus*. *Villiers v. Villiers* (k).

If the act insisted upon as a revocation by implication be *incomplete*, as in the instance of a feoffment without livery, proof may be adduced to repel the *implied* revocation. (l) *Winkfield's case*.

An alteration in the circumstances of testators has been permitted, in some cases, to revoke prior wills. Thus where *A.* devised away his whole estate, and afterwards married and had children, the subsequent marriage and birth of issue were adjudged to have annulled the will, upon an implied intent that the testator could not mean to disinherit his own blood, by allowing his will to remain in full force. *Pater credens, filium suum esse mortuum alterum instituit*.

(k) 2 Atk. 71. (l) Godb. 132. Owen 76.

*haeredem, filio domi redeunte hujus institutionis vis est nulla* (m). (n) *Brown v. Thompson* (o), *Christopher v. Christopher*, and (p) *Spragge v. Stone*.

It seems necessary, however, that both circumstances should concur, (viz.) marriage and the birth of a child during the marriage, or in due time afterwards (q), in order to lay the foundation for a presumptive revocation. Thus in *Shepherd v. Shepherd* (r), sent out of Chancery by Lord *Camden*, for the opinion of Sir *George Hay*, it was determined, that the birth of a child alone was insufficient to revoke a prior will. The facts of that case were as follow:—*Shepherd*, the testator, having made his will, and bequeathed some small legacies to his collateral relations, constituted his wife residuary legatee. In the year 1763, (subsequent to the making of his will) his wife was delivered of a daughter, upon whose birth he added a codicil, directing that the legacies should be paid, and that an annuity of 300*l.* should be secured upon the *residuum*, and paid to his daughter; the will and codicil were found together. In 1765, another daughter was born, and in 1768, a son also, who was a posthumous child, the testator being dead about

(m) *Cic. de Orat. Cantab.* Ed. 69.

(n) 1 *Eq. Ca. Abr.* 413 pl. 15. (o) 4 *Burr.* 2171, note 2182.

(p) 27th March 1773, at the Cockpit.

(q) 5 *Term. Rep. K. B.* 49.

(r) *Douglas* 37. note 5. *Term. Rep. K. B.* 51. in notis.

six months before his birth. And upon the question submitted to Sir George Hay, (viz.) whether the subsequent birth of children was a revocation of the will, he gave his opinion in the negative.

In Lancashire *v.* Lancashire (*s*), Lord Kenyon, C. J. is reported to have said, that perhaps this rule of law had its foundation not so much in an *intention* to alter the will, *implied* from those circumstances happening afterwards, as a tacit condition annexed to the will itself at the time of making it, (viz.) that the party does not then intend the will to take effect, if there should be a total change in the situation of his family.

Marriage alone is a revocation of a woman's will (*t*). First, because it was her *own act* to take a husband afterwards; and, second, because the construction that marriage is a revocation only in case the wife shew her intention that it should be so, might be disadvantageous to her; as the husband, by the exercise of undue influence, might oblige her either to revoke or continue it, as best suited his interest. (*u*) Forse *v.* Hembling.

(*s*) 5 Term. Rep. K. B. 58, 59. (*t*) 2 Bro. C. C. 534.

(*u*) 4 Rep. 61. Swinb. 270. Anders. 181, and Gouldsb. 109. S. C.

It is said, in Plowden (*x*), that if the wife survive the husband, the revocation or countermand of the will by the intermarriage is done away, upon the principle that the disability of marriage being removed, there is nothing to prevent the will, made prior to the coverture, from taking effect at her death. But this doctrine is not altogether free from objection; for it is essential to the nature of a will, that it should be ambulatory, and liable to be altered or revoked at any period during the life of the testator. This being so, the woman by marrying, disables herself from making any other will, or altering or revoking the old one, so that the instrument upon the marriage ceases to fall under the essential description of a will, and, as I conceive, must be void, whether the woman survive her husband or not (*y*). And note the distinction, when the disability is to be imputed to the party, and when to the visitation of God. For if a person, after making his will, become *non sane memoriae*, the disability will not revoke it (*z*).

Marriage and the birth of children being mere *presumptive* revocations, they may be repelled by parol evidence. (*a*) *Brady v. Cubitt.*

(*x*) *Plowd, Com.* 343. 2. (*y*) *2 Bro. C. C.* 544.  
(*z*) *4 Rep.* 61. *b. Swinb.* 68. 69. (*a*) *Dougl.* 30.

SECOND—*In relation to express revocations.*3. *Express revocations by will and codicil.*

We have seen, from the perusal of the 6th section of the statute of frauds, that every devise in writing of lands, tenements, or hereditaments, or any clause thereof, will not be otherwise revoked than by another will or codicil in writing, or other writing declaring the same, *signed by the testator, in the presence of three or more credible witnesses, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent.*

In the construction of this clause, it has been determined, that *sealing* includes *signing*, and that sealing or signing, in the presence of three witnesses, is sufficient, although they do not attest the fact *in writing*; the actual subscription by the witnesses being adopted for the purpose only of facilitating the recollection of the circumstance to their minds. (b) *Townshend v. Pearce.*

But the signing required by the statute must be such as will give authenticity to the instrument; for the mere insertion of the testator's

(b) 8 Vin. Abr. 142. pl. 3. Tit. (Devises).

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Marriage and the birth of children being mere *presumptive* revocations, they may be repelled by parol evidence. (*a*) *Brady v. Cubitt.*

(*x*) *Plowd, Com.* 343. a. (*y*) *2 Bro. C. C.* 544.  
(*z*) *4 Rep.* 61. b. *Swinb.* 68. 69. (*a*) *Dougl.* 30.

SECOND—*In relation to express revocations.*3. *Express revocations by will and codicil.*

We have seen, from the perusal of the 6th section of the statute of frauds, that every devise in writing of lands, tenements, or hereditaments, or any clause thereof, will not be otherwise revoked than by another will or codicil in writing, or other writing declaring the same, *signed by the testator, in the presence of three or more credible witnesses, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent.*

In the construction of this clause, it has been determined, that *sealing* includes *signing*, and that sealing or signing, in the presence of three witnesses, is sufficient, although they do not attest the fact *in writing*; the actual subscription by the witnesses being adopted for the purpose only of facilitating the recollection of the circumstance to their minds. (b) *Townshend v. Pearce.*

But the signing required by the statute must be such as will give authenticity to the instrument; for the mere insertion of the testator's

(b) 8 Vin. Abr. 142. pl. 3. Tit. (Devide).

name in the body of it, and *applicable to a particular purpose*, will not amount to such an authentication as the law requires. (c) Hilton *v.* King, and (d) Stokes *v.* Moor.

The revocation of a devise of money, payable out of real estate, being considered as a devise of so much land, must be effected in the same manner, and with the like solemnities, as are required to revoke dispositions of real property, (e) Brudenell *v.* Boughton.

It is not only essential that a subsequent will be executed, pursuant to the above clause, in order to revoke a prior, but it is also necessary that the *contents* of the second will should be known, before it can be adjudged a revocation; and for this reason, because the mere circumstance of making a subsequent will is of itself an *equivocal* act, and may not be done *animi revocandi*; so that until the circumstances attending it be known, no absolute revocation will be effected. Thus in (f) Seymour *v.* Nof-  
worthy, the finding by the jury of *aliud testamentum in scriptis* only, without the contents, was not allowed to revoke a prior will; and in (g) Good-

(c) 3 Lev. 86. (d) 1 P. Will 771. in notis. 5th. Ed.  
(e) 2 Atk. 268. (f) Hard. 374. Show. P. C. 146. S. C. re-  
ported also by the name of Hitchins *v.* Basset. 3 Mod. 203.  
1 Show. 537. Comb. 90. (g) Cowp. 87. 7. Bro. Parl. Ca.  
344. S. C.

right *v. Harwood*, the court determined, that although the jury found a subsequent will, *different* from the first, yet, as they were unable to ascertain the *particulars* of such difference, the prior instrument should not be revoked. *Similiter*, the mere existence of a will, without a knowledge of the contents, will not *disinherit* the heir (*h*).

In analogy to the reasoning in cases where marriage and the birth of children are allowed to revoke wills, it seems, that if a person intend to defeat a prior disposition, in consequence of a *mistake*, such as a belief in the devisee's death, when he is in fact living, and the like, the prior instrument will not be revoked by the latter, it being obvious, that a supposed event was the sole motive for the testator's intended alteration of his will; therefore, as that event never in truth happened, the foundation being withdrawn, the superstructure necessarily falls to the ground.

(i) *Campbell v. French*.

But if the error in the testator do not originate in an ignorance of facts, but a mistake in *legal consequences*, although the second will be made under an idea that no such error existed; yet the reality of the mistake will not prevent a revocation of the prior disposition. Thus if *A*, by

(*b*) *Cowp. 92.* (*i*) *3 Ves. Jun. 321.*

a second will devise his real estates to particular uses, suggesting that he had been *advised* that those he had previously declared could not take effect, although the advice prove erroneous, such mistake will, nevertheless, revoke the first disposition; because the advice, and not the correctness of it, is considered as *causa testandi*, and the intent of the latter will may have been for the purpose only of preventing litigation after the testator's death, in relation to the validity of the first devise. (k) *The Attorney General v. Lloyd.*

Although a subsequent will be sufficient to revoke a prior, yet the effect of the revocation will depend upon the existence of the latter instrument at the time of the devisor's death; wills being ambulatory and inoperative before that period. Therefore, if *A.* make his will, and devise lands to *B.* and by a second devise the same property to *C.* but *A.* before his death destroys the latter will, the first will not be revoked, as it remains the only effective instrument at *A.*'s death. *Goodright v. Glazier* (l). But if *A.* shew a fixed intention to revoke his prior will, as by inserting in the second an express clause of revocation, the cancelling of the latter instrument will not revive the former. (m) *Burtenshaw v. Gilbert.*

(k) 3 Atk. 551. 553. 1 Ves. 32. S. C. (l) 4 Burr. 2512.  
(m) Cawp. 49.

If there be two inconsistent wills, the latter revoking the former, and the testator, by a codicil properly executed, refer to the first will, and ratifies and confirms it, without ever noticing the second, the codicil will set up the revoked instrument and cancel the second, and no *external* evidence will be permitted to shew that the second will, and not the first, was intended to be referred to by the testator. Thus *A.* made a will, dated the 25th of *November* 1752, and another dated the 31st of *March* 1756, and by a codicil properly signed and attested, *A.* expressed himself as follows: “Whereas I have made my last will and testament, dated the 25th day of *November* 1752, and duly signed and published the same, whereby I have devised all my real estates to certain uses, but have not charged the same with the payment of my debts, nor any legacies, nor disposed of my personal estate, nor appointed any executor; now I do hereby declare this writing to be a codicil to my said will, and to be accepted and taken as part thereof, as fully and effectually, to all intents and purposes, as if the same had been actually inserted therein; and I do, by this my codicil, revoke my said will, so far only as the same is incompatible herewith.” It was insisted by a devisee in the second will, that the testator did not intend to refer to the first, as mentioned in the codicil, but to the second, and that the date of the first will was inserted in the codicil

by

by mistake, of which evidence was produced: and it was determined, first in the Court of *Common Pleas*, and afterwards in the Court of *King's Bench*, that such evidence could not be admitted, and that the codicil revived the first will, and revoked the last. (n) *Lord Walpole v. Orford.*

But if a person annul part of his will by a codicil, and afterwards adds another codicil, referring to the will for a particular purpose, and then confirms the will in other respects, such second codicil will not revive the part revoked by the first, because the first codicil being part of the will, must be considered such, and not as a distinct and inconsistent instrument. Accordingly, in a case where *A.* bequeathed by his will two annuities of 300*l.* and 200*l.* to *C.* by a fifth codicil (which he expressed to be a codicil to his will) he substituted one executor in the place of another, and concluded with confirming his will in all other respects. The question was, whether the fourth codicil was revoked (so far as it militated against the will) by reference of the fifth to the will; and the Master of the Rolls determined, that it was not revoked upon the principle that the fourth codicil being part of the will, was as much con-

firmed by the last codicil as any other member of it. *Crofbie v. Mac Doual* (o).

It sometimes happens, that a person leaves behind him two inconsistent wills, of the same date. In those instances, if no evidence can be adduced to ascertain which of them was last signed, both will be rejected for uncertainty. *Phipps v. the Earl of Anglesea* (p).

By the 5th clause of the statute of frauds (q), it is declared—"That all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills (r), or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be *attested* and subscribed in the presence of the devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

In the construction of this clause, in reference to the sixth of the above statute, a distinction seems to prevail in respect to revocations, when

(o) 4 Ves. Jun. 610. (p) 5 Bro. Parl. Ca. 45.

(q) 29. Car. 2. cap. 3.

(r) 32 Hen. 8. cap. 1. explained by, 34 Hen. 8. cap. 5.

a will is intended to *revoke* a prior only, and when it moreover *attempts to dispose* of the devised estates, (viz.) that, in the first case, a will signed by the testator in the presence of three witnesses, without their attestation, is sufficient; in the second, that their subscription is necessary (s), So that if *A.* by will, signed in the presence of three witnesses, but unattested by them in writing, not only *revoke* a prior, but *devise* the lands to a stranger; the second instrument, though sufficient within the words of the sixth clause of the statute to effect a mere revocation, for want of the ceremonies required by the fifth clause of the statute, would neither pass the estate, nor revoke the first will.

I have met with no express determination upon the subject, but a strong opinion of Lord Cowper in the case of (t) *Onions v. Tyrer.* *A.* by a second will, signed by him, but *not attested* by three witnesses *in his presence*, devised the lands comprised in the first will to the *same uses* therein limited, but to different trustees. Upon a question of revocation, the Chancellor declared, that if *A.* had *barely revoked* his first will by the latter, a revocation would have been created; but *A.* having devised the estate to the same purposes as in the first will, could not intend to revoke the

(s) 3 Lev. 86. 3 Mod. 258.

(t) 1 P. Will. 343. Pre. Ch. 459. S. C.

former,

former, but to confirm it. And his Lordship said, that if *A* had, even by the latter will, *devised* the premises to a *third person*, that circumstance would not let in the heir.

It is obvious, that the distinction made by Lord Cowper in the above case between a *revoking* will and a *devising* and *revoking* one, can be only reconciled by relation to the different constructions applicable to the fifth and sixth sections of the statute of frauds, and the intention of testators.

The sixth section of the statute, as we have seen before, does not require the *attestation* of the witnesses *in writing* to the signature of the testator, in order to revoke a will disposing of freehold lands. The fifth section makes the *attestation* of the witnesses *in writing* an essential requisite to every disposition of freehold estates by will. If a person, therefore, intend to *revoke* his will *only* by a second, it will have that effect, though the witnesses do not attest his signature *in writing*. But if he make a new disposition of his real estate by the same will that intends to revoke the former, but which disposition must be disappointed for want of the *attestation* of the witnesses *in writing*, the operation of the second instrument will be governed by the intention of the testator, which will be presumed in favour of a revocation, only upon condition  
that

that his new disposition could take effect; the second will, therefore, being insufficient to pass the freehold estate to the person intended, will not be allowed to revoke the prior, and create an intestacy in favour of the heir; for *non constat*, that the testator would have revoked his first will, but as a necessary preliminary to his new disposition.

A *codicil* is considered as a part and continuation of the will, and is never presumed to revoke it; therefore a codicil will not have that effect, unless the testator has considered it as a distinct instrument, by expressly revoking the will, or by making a disposition inconsistent with it; so that if a person die leaving a will and several codicils, they will operate as one instrument, and receive a like construction.  
(u) *Willet v. Sandford*, and (x) *Stone v. Evans*.

In the construction of the twenty-second section of the statute of frauds, which requires certain formalities to be observed in the revocation of *personal* bequests by nuncupative wills, it seems to be established, that if a nuncupative testament do not *attempt to alter* any disposition contained in a prior will in writing, but operates as a *distinct* and *substantive* bequest, it will be effective, although not complying with the ceremonies prescribed by the clause above referred

(u) 1 Ves. 178, 186.

(x) 2 Atk. 86.

to. Thus if *A* bequeath the residue of his personal estate to *B.*, *who dies in his life-time*; and *A.*, by a subsequent nuncupative will, not executed as required by the statute for revoking testamentary dispositions of personal estate, bequeathes such residue to *C.*, the second testament will be an effectual disposition of the residue. (y) Anonymous.

Testaments *in writing* do not fall within the letter or meaning of the statute; therefore if *A.*, by a second will in his own hand-writing, or by a writing signed or approved by him, bequeath his personal estate in a manner inconsistent with the first, the last disposition will revoke or defeat the prior. (z) *Hyde v. Hyde.*

## 2. Revocations by burning, cancelling, tearing, and obliterating wills and testaments.

The mere act of burning, &c. a will or testament, is not of itself an absolute revocation; the deed being *equivocal*, and perhaps the effect of accident, requires to be explained before the power of revocation can be ascribed to it; for if the cancelling, &c. be done in *mistake* by the testator, as under the persuasion that a prior will was valid when the truth is the reverse (a); or if it be effected by the misconception of a third per-

(y) *Raym.* 334.

*Rep.* 453. S. P.

(z) *1 Eq. Ca. Abr.* 409. *pl. 3. Com.*

*(a) 1 Eq. Ca. Abr.* 409.

*son,*

son, as when a stranger being directed to burn a particular will, destroys another by mistake (b); or if an obliteration be made with a view only to a new will, which is never perfected (c). In these and similar instances, the acts of burning, &c. will effect no revocations. Perhaps the rule may be thus considered: as the statute has declared what particular acts shall have the effect of revoking wills, the presumption shall be *prima facie* in favour of revocations in all cases, when any of these acts are found exercised, subject to be repelled by evidences of a different intention *aliud*.

A *partial* obliteration will not amount to a *total* revocation; therefore if two estates, situate at *C.* and *D.*, are devised to trustees for various purposes, and the testator, after completing his will, strikes his pen through that part which disposes of the estate at *C.*, the devise of the property at *D.* will not be revoked by the obliteration. (d) *Sutton v. Sutton.*

If there be ever so many parts or duplicates of wills, the cancelling of *one*, will destroy the effect of the remainder. (e) *Sir Edward Seymour's case*, and (f) *Burtenshaw v. Gilbert.*

(b) *Cowp. 52.*

(c) *8 Vin. Abr. 146. pl. 17. Tit. Devise.* (d) *Cowp. 812.*

(e) *Cited 1 P. Will 346. 2 Vern. 742.* (f) *Cowp. 54.*

ON

TO VOLTAIRE'S EDITION  
OF THE HISTORY OF ENGLAND  
BY J. J. BOSWELL, M. A.  
ON THE REPUBLICATION OF WILLS  
AND TESTAMENTS.

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THE discussion of the law of revocations in the last chapter, naturally leads to the consideration of the method by which revoked wills may be rendered again effective: this object may be attained by a republication.

In considering the subject, I shall divide it under two heads:

FIRST—How the law of republication stood, before the (g) statute of frauds and perjuries.

SECOND—What are the alterations made by that act;—and of republications in general.

1. *How the law of republication stood before the statute of frauds and perjuries.*

It is obvious, from an attention to the early cases, that the inclinations of courts of law

(g) 29. Car. 2. cap. 3.

D

were

were much in favour of supporting republications of wills and testaments. When the intent to republish could by any means be ascertained, it was allowed that effect, even though such intention rested in pure *verbal declarations* (h). Thus if *A.*, after revoking his will, or after a new purchase, *acknowledged* and *declared* that he intended, and looked upon such will as his only and proper one, this acknowledgment would have amounted to an effectual republication. (i) *Trevillian's case*; (k) *Montague v. Jefferies*; (l) *Beckford v. Parnicot*; (m) and *Cotton v. Cotton*.

The ill consequences attending this rule of law were (as may be easily conceived) similar to those which, we have already observed, followed the doctrine of *parol* revocations before the statute; to remedy those mischiefs, a new rule was adopted by courts of judicature after the passing of the act, requiring the same solemnities to *republish*, as to *make*, an effectual will of lands. This leads to the consideration of

2. *What are the alterations made by the statute;— and of republications generally.*

A subsequent will or codicil for the purpose of republishing a former one of lands, must be

(b) *Roll. Abr.* 617. z. (1) pl. 30. (i) *Dyer* 143. a.

(k) *Roll. Abr.* 617. pl. 50. *Moor* 429. S. C.

(l) *Cro. Eliz.* 493. (m) 2 *Ch. Rep.* 72. 1 *Freem.* 264. S. C.

signed

signed by the testator in the presence of, and attested by, *three* or more witnesses; and parol evidence will not now be admitted to establish a republication of a will of freehold estates. (n) *Lytton v. Falkland*, and (o) *Martin v. Savage*. But with respect to *personal estate*, the common law seems to have undergone no alteration; so that parol declarations of an intent to republish, will be admitted when applicable to that species of property. To this source may be traced the *dictum* of Lord Hardwicke, in (p) *Abney v. Miller*. *A.*, after making his will, renewed his leases, which revoked the disposition of them. *A.* with another person, being in search after a paper, the latter having taken up the will by mistake, *A.* exclaimed, *That is my will*; and his lordship said, this reference to the will did not amount to a republication, as no *animus republicandi* attended it; whence an implication arises, that if the declaration had been accompanied with such an intention, it would have been competent to effect a revocation. See also (q) *Coppin v. Fernyhough*.

Devises of *copyhold* estates are not considered as included within the provisions of the statute, they therefore remain the same as at common law, in regard to republications. The principle

(n) Cited *Comyns*, 383. (o) 2 *Vern.* 621. (p) 2 *Atk.* 599.  
(q) 2 *Bro. C. C.* 291.

must be this: copyholds being omitted in the statute of wills, as not of *socage* tenure, the power of devising them can alone be exercised through the *medium* of uses, viz. upon a prior surrender to uses, to be declared afterwards, which is generally done by will operating, not as a devise of the lands, but a simple declaration of uses. Now the latter may be declared by any instrument in writing; *pari ratione* when such writing is *testamentary* and revoked, it may be revived by another instrument not bearing the requisites of the statute. (r) Burkitt *v.* Burkitt, and the other references in the notes (s).

We must distinguish, however, between copyhold estates, and those termed *customary freeholds*; the latter is of a higher tenure than the former, and in general not transferred by surrender. In devises of them, therefore, when no surrender is required by the custom of the manor, as the legal and equitable interests must pass under the will, there is no reason why these estates should not be considered as included within the statute of frauds; so that we may reasonably infer, that a second will or codicil to republish a prior, including customary freeholds, must be stamped with all the formalities required by that act. (t) Hussey *v.* Grills.

(r) Eq. Ca. Abr. 402. 2 Vern. 498. S. C.

(s) 2 Rol. Rep. 383. Gilb. on Uses. 2 Atk. 37. 2 Bro. C.C. 58.

(t) Ambl. 299.

Republications by *implication* also remain the same as before the statute; for these depending upon inferences from facts not established by parol evidence, are considered as neither within the mischief, nor purview of it. Thus where *A.*, after the date of his will, made a feoffment of the lands devised, to the use of such persons, and for such estates, as he *had declared* by his will; it was determined that, although the feoffment revoked the will, the reference of the former to the latter operated as a republication; and that the will was competent to declare the uses of the feoffment. (*u*) Hussey's case. And with an eye to the same reasoning, Lord *Mansfield* appears to have decided the case of (*w*) *Helyn v. Helyn*.

It has been matter of considerable doubt and nicety to distinguish the cases in which a *codicil* was to be considered a republication of a prior will devising real estates; we may, perhaps, consistently with the principal cases on the subject, lay down the following propositions on that head.

The mere *annexing* a codicil to a will, is (as it seems) sufficient of itself to effect a republication, whether reference be made to the will or

(*u*) *Roll. Abr.* 617. 2. (4). pl. 40. *Moor* 789. S. C.

(*w*) *Cowp.* 130.

not; and for this reason, because strong evidence arises from the act of annexation, that the testator intended *both* instruments should be considered as *one from the period of their union* (x). (y) *Alford v. Alford*, and (z) *the Attorney General v. Downing*, (a) *Hutton v. Sympson contrà* being considered by Lord *Camden* in the last case as ill-reported, or else not law.

If the codicil be *not* annexed to the will, but the contents unquestionably shew that the testator had his will in contemplation at the time of making the codicil, and *intended* the latter to be a republication of the former, it will be allowed that effect, though *not annexed* to the will; as in those cases where the codicil *recites* the existence of the will, and *expressly ratifies and confirms it*; for the ratification and confirmation are equivalent to a republication of each devise. (b) *Acherly v. Vernon*; (c) *Potter v. Potter*; (d) *Pate v. Davy*; and (e) *Jackson v. Hurlock*.

It seems, however, to be the principle of the majority of the cases, that the *mere existence* of a codicil will not amount to a republication of

(x) *Roll. Abr. 618. pl. 20. Wentw. Off. Exec. 24.*

(y) *Cited 3 P. Will. 168. (z) Ambl. 572—3.*

(a) *2 Vern. 722. Pre. Ch. 439. S. C.*

(b) *Comyns, 381. 3 Bro. Parl. Ca. 107. S. C. (c) 1 Ves. 437.*

(d) *Cowp. 158. (e) 2 Bro. C. C. 514. cited.*

a will of lands, unless the *intent* be apparent from the circumstance of annexation, or from the contents of the codicil; and the better opinion appears to be, that if the codicil do not confirm the will, or if its contents be not of such a nature, as from their incorporation with the will to evince a clear intent to republish, a mere disposition of *personal property* by a *separate* codicil will not amount to a republication of a prior devise of real estate. (f) *Montague v. Jefferies*; (g) *Beckford v. Parnacot*; (h) *Lytton v. Falkland*; (i) *Lord Lansdowne's case*.

With these distinctions and limitations, the leading cases may, I think, be reconciled upon principle; for making a codicil is a mere *equivocal act*, and in regard to republications (as in cases of revocations) requires to be explained. Since the statute of frauds and perjuries, the intention to republish a will devising freehold lands can be manifested only by an act complete in the testator's life-time, as by *annexing* the codicil to the will, or by an act inoperative *before* his death, as by a codicil referring to and confirming the will, &c. the intention to republish in these cases being strong

(f) *Roll. Abr.* 617. pl. 50.

(g) *Ibid*; *Cro. Eliz.* 493. Dy. 143. marg. (b) 2 *Vern.* 621.

(i) Cited *Comyns*, 384. and commented upon by Lord Camden in the *Attorney General v. Downing*, *Ambl.* 572—3—4.

and manifest. It is obvious, however, that no such intent can be certainly inferred from the mere circumstance of a person mentioning his will in a codicil, and making a few alterations in the disposition of his personality. His motives may be quite foreign to an intention of giving his will an operation in respect of his real estate, which it had not at the time of its execution, or of which it was deprived by a prior revocation. They may proceed from disgust towards particular legatees, increase of affection for other persons, and the adventitious existence of objects of his care and provision. Verbal declarations to explain this uncertainty being inadmissible, it seems to result as a necessary inference, that a *separate* codicil, varying only the dispositions of the personal estate bequeathed by will, can not republish it, in relation to the real property. I am aware, indeed, that Lord *Hardwicke* intimated an opinion in *Gibson v. Montford* (k), that according to *Acherly v. Vernon*, every codicil executed pursuant to the statute of frauds would effect a republication, although it related to *personal* estate only, as the Judges in that case considered the codicil to be *incorporated* with the will, his lordship having deduced an inference from that circumstance, that as every codicil is a part of the will (although not expressed to be so), the former, when properly

(k) 1 Ves. 489, 493.

executed,

executed, would *always* republish the latter. The case (*1*) of *Acherly v. Vernon* was to the following effect. *A.* devised the *residue* of his real and personal estate to trustees to certain uses: *A.* afterwards purchased several fee-farm rents, assart-rents, lands and tenements, and by a codicil, made two days before his death, *reciting that he had made his will, ratified and confirmed it, except in the alterations therein after-mentioned.* *A.* then made several alterations in his prior dispositions, and gave his after-purchased lands to his trustees and executors, *to the same uses and upon the same trusts* to which he had devised the principal part of his real estate, and *revoked* his will as to the appointment of three trustees, nominating two other persons in their places, and *devised his real estates to them.* Lord *Macclesfield* determined that the codicil was a republication of the will, which decree was affirmed on appeal to the House of Lords.

With deference to the conclusion Lord *Hardwicke* drew from this case, it is submitted, that the decision does not warrant the inference. Then what were the grounds of the judgment? not the mere consideration that a codicil is always looked upon as a part of a will, and therefore, from its nature, must amount to a republication; but the words or contents of the co-

(*1*) *Comyns*, 381. 3 Bro. Parl. Ca. 107. S. C.

dicil,

dicil, which were *so blended with and incorporated into the will*, as to shew an evident purpose in the testator to republish the will by the codicil. The above observations appear to be countenanced by the opinion of Lord *Camden*, in the case of the Attorney General *v.* Downing (*m*), in which he declared that a mere codicil, not annexed to the will, was insufficient, from the *nature of the instrument itself*, to operate as a republication, and that an intent to republish is necessary. This question was also discussed in Barnes *v.* Crow (*n*). A., by a second codicil executed according to the statute of frauds, and *annexed* to his will, after making some alterations in the state of his affairs, disposed of a leasehold estate, but did not notice certain lands purchased after the date of his will; upon a question of republication, the *Lords Commissioners* of the Great Seal determined, that the will was republished by the codicil, and the new-purchased lands passed by it.

Although this case obviously classes amongst those which have been adjudged to amount to republications, from the circumstance of annexation and reference, yet *Eyre Ch. Com.* in pronouncing the judgment of the court, leaned in favour of Lord Hardwicke's opinion in Gibson *v.* Montford; observing, that he was afraid to

(*m*) *Ambl.* 573—4.      (*n*) *4 Bro. C. C.* 2.

rely the doctrine of republication *upon circumstances*, lest he should intrench upon the statute of frauds, by raising republications out of evidence in its nature parol. With due deference, however, to his lordship's opinion, there appears to be no stronger reason for refusing this inference of intention to republish upon acts of testators, than is applicable to questions upon revocations of wills; and we have seen in the preceding chapter, that the mere execution of a second will, or codicil, is not of itself sufficient to revoke a prior disposition, as no *animus revocandi* can be collected from that circumstance, neither is any danger to be apprehended (as I conceive) of intrenching upon the statute of frauds, from deciding that a codicil *found annexed* to the will of a person at the time of his death shall, by conclusion of law not to be repelled by the admission of parol evidence, have the effect of republishing such will. However, as in *complete* revocations of wills, the intent is not allowed to be explained by oral testimony, neither will it be permitted to ascertain an *intent to republish*; for although parol evidence is admitted *ex necessitate* in *some instances* since the statute, we are not therefore to conclude that it must be admitted in all. The result of the above observations produces the following conclusion, that the mere execution of a codicil is not, in its own nature, simply a republication of a will, *pro defectu animi republicandi*;

*licandi*; and that, as such intention cannot be certainly inferred in relation to the real estate, from the mere alteration or new arrangement of the personal by a subsequent codicil, the impossibility to admit parol evidence in explanation of the act, since the statute prevents a codicil, either alone or referring only to the personal estate, from republishing a prior will of the real.

The effects of *infancy* are such as to render most of the acts of minors (i. e.) of persons under twenty-one years of age, void or voidable. Thus an infant is disabled from devising his real estate; yet, if after attaining twenty-one, he re-execute his will pursuant to the statute, the defect will be remedied by the republication (*o*), but nothing short of these ceremonies will be sufficient (*p*).

As the will regulates the manner in which legatees or devisees are to take under it, if they are intended to do so by *descent*, a subsequent republication will not enable them to take by *purchase*. Thus, if a devise were made to *A.* and the *heirs male of his body*; if *A.* died in the life of the testator, leaving a son, whereby the devise became lapsed, a republication of the will

(*o*) 1 Sid. 162. 1 Keb. 589. (*p*) Comberb. 84.

could.

could not substitute the son in *A.*'s place, so as to entitle him to the estate as *heir of the body of A.*, because the intent of the will was to transmit the property to him in a *course of descent*. But if the republication were to have the effect of reviving the devise, the son must claim it as heir of the body of *A.* by *purchase*, which would be inconsistent with the will. (q) *Simpson v. Hornsby*.

To the same principle may be attributed the reversal of the judgment of the *Common Pleas*, in (r) *Steed v. Berrier*. In that case, *A.* devised lands to his younger son *B.* and *his heirs*; *B.* died in the life of *A.* leaving a son named *B.*, who was intitled to a legacy under the will, in which he was stiled the *grandson* of *A.* and upon a subsequent republication by *A.*; it was finally determined in the King's Bench that *A.* could not intend to substite *B.* the son in his father's place, under the description of *son*, as he had distinguished between the two degrees of son and grandson in the will, by the legacy given to *B.* by the description of *grandson*; therefore *B.* should not take the estate devised to his father. And according to the principle which governed the decision in (s) *Simpson v. Hornsby*, before re-

(q) *Pre. Ch. 439. 4 Term. Rep. K. B. 601. S. P.*

(r) *Raym. 408. 2 Mod. 313. 2 Lev. 243. S. C.*

(s) *Suprā.*

ferred to, if no legacy had been given to *B.* the son, he could not have taken the lands by the mere republication of *A.*'s will, as it is apparent that he was intended by the will to succeed to the devised estate *by descent*, as *heir* to his father, and not as the stock or *descriptio personæ* *by purchase*.

A republication places a prior will in the same condition, in regard to its operation, as if it were then made (*t*). The consequence of the rule is, that real estates, purchased between the date and republication, will, in general, pass by the will in the same manner as if the testator had been seized of such estates at the time of making it (*u*). It appears, however, from the above observations, that if the terms of the will be insufficient to include the after-purchased lands, in case the devisor had obtained them prior to his will, the mere act of republication cannot give it that effect. Accordingly, if the description in the will be confined to lands *in a particular place or district*, and the new-purchased estate is not within it; as if *A.* devise all his lands in *Dale* to *B.*, and afterwards purchase an estate in *S.*, the latter will not pass by *A.*'s will to the donee of the lands in *Dale*, *pro defectu descriptionis*.

(*t*) 2 P. Will. 329. 334. (*u*) Roll. Abr. 618.

Another consequence to be deduced from the above view taken of republications, is, that if a will be not properly signed and attested to devise real estates, a codicil, operating as a republication, cannot supply the defect, although it be executed according to the statute. The Attorney General *v.* Baines (x).

(x) Pre. Ch. 270.

*TRACTS*

**TRACTS ON THE LAW OF  
BARON AND FEME.**

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BY marriage the husband and wife are as one person in law; and on this union depend almost all the legal rights and disabilities that either of them acquire by the intermarriage (*y*). The wife being the weaker of the two, is placed under the care, guidance, and protection of the husband. The authority of the man over the wife, says Dr. Hartley, is but a mark of our degenerate state, by reason of which, dominion must be placed somewhere, and therefore in the man, as being of greater bodily strength and firmness of mind (*z*). I shall consider this subject under the following heads:

**FIRST**—The rights acquired by the husband in the *real* and *personal* estates of the wife, and his *power* over the former.

**SECOND**—The rights acquired by the wife, in the *real* and *personal* estates of the husband, and her *power* over the former.

(*y*) Litt. Sect. 168, 291. 1 Black. Com. 442.

(*z*) Essay on Man, 2 vol. 301.

**THIRD**

THIRD—The disabilities of *coverture*.

In treating upon the first division of my subject, I shall consider each member of it separately.

1. *The rights acquired by the husband in his wife's real estates.*

By the intermarriage, the husband acquires a freehold interest during the joint lives of himself and wife in all such freehold property as she was seized of at that time in fee-simple; upon this freehold there may be a *remitter* (a). The husband *alone* may make a tenant to the *præcipe* for suffering a recovery (b); and he may take a release or confirmation to enlarge his estate (c); but if he be attainted of felony, the king will not on that event acquire the freehold, but the pernancy of the profits only, during the *coverture* (d). The husband's interest may be defeated by the act of the wife *before* issue had. Thus if she be attainted of felony, the Lord by *escheat* may enter and eject the husband; *contra*, if after issue born (e); for then the husband is intitled to an estate for life in his own right as tenant by the *curtesy initiate*. After birth of issue, the husband *alone* is intitled to do homage to the Lord for such lands; whereas

(a) Co. Litt. 351. a. (b) Pig. Rec. 72. Cruise Rec. 38.

(c) Co. Litt. 299. a. (d) Co. Litt. 351. a.

(e) *Ibid.*

before issue had, he and the wife must have done it together (*f*); so that upon issue born, the husband becomes tenant to the Lord, which necessarily prevents an escheat to him for felony committed by the wife. This leads me to the consideration of the husband's title as

*Tenant by the curtesy.*

The husband is intitled for life to such lands and tenements of the wife as she is seized of in fee-simple or fee-tail, upon having issue by her born alive, that may by possibility inherit the estate (*g*).

Before the statute of Westminster the second (*h*), if lands had been given to husband and wife, and the heirs of their two bodies, and after issue born the husband died, and then the wife continuing seized of such estate, took another husband, and after having issue by him also died, the second husband would have been tenant by the curtesy (*i*); and for this reason, at common law, the *feme donee*, after birth of issue, was considered as acquiring by that event an estate of inheritance capable of disposition and of forfeiture, and transmissible to her lineal descendants *in infinitum*; for as the wife might have substituted strangers to have been absolute owners of the estate by ex-

(*f*) 2 Black. Com. 126.

(*g*) Litt. sect. 35, 52.

(*h*) De donis conditionalibus, cap. 1.

(*i*) Perk. sect. 465.

press alienation, so all the lineal heirs she might ever have of her body, were, by construction of law, intitled to inherit to her after the birth of the first inheritable child, as a benefit and incident *tacite* annexed to her estate (*k*); consequently the second husband, in the case proposed, was intitled to be tenant by the curtesy. But the law is now altered by the above statute; so that if feme donee in *special* tail have issue by one husband, and afterwards issue by another, and then dies during the life of the second husband, he will not be intitled to curtesy, because the children of the last marriage cannot possibly succeed to the wife's estate. But if a single woman, seized of lands in fee-simple, marry, have issue, and the husband dies, and she being so seized takes a second, hath issue by him and then dies, living the issue of the first husband, yet the second shall be tenant by the curtesy, *causa patet* (*l*).

*A.* devised to *B.*, a married woman, certain lands in fee-simple; but if she died before her husband, he then gave such husband 20*l.* a-year for life, with remainder as to the lands to *B.*'s children. *B.* died during the husband's life, and it was adjudged, that he was not intitled to curtesy, because the issue did not claim from

(*k*) Co. Litt. 19. a. 8 Rep. 35, b.

(*l*) Bro. *Curtesy*, 8. Perk. sect. 466.

the wife by *descent*, but under the will as *purchasers* (m).

If feme tenant in tail general and husband levy a *fine*, and retake an estate to them and the heirs of their two bodies, and have issue, the husband dies, and the widow marries again, hath issue, and dies, and then the second husband claims curtesy, upon the supposed *remitter* of the wife to her first entail: it seems that such claim will not be allowed, for as the wife is *estopped* by the fine from claiming her old estate, so is the second husband who must derive his title through her (n).

It has been said, that if lands be given to two women and the heirs of their two bodies, and one marries, has issue, and dies, living the other sister, the husband shall be tenant by the curtesy upon the principle, that the sisters were tenants in common in possession of the inheritance in tail (o): but this construction seems to be shaken by Littleton in section 283; for he says, if lands be given to two men and the heirs of their two bodies, they shall be joint tenants for the term of their lives, with several inheritances in tail; and the case of the women is mentioned by Lord Coke, in his *Commentary* upon this

(m) 2 Atk. 47. 9 Mod. 147. (n) *Bro. Curtesy*, (1),  
(o) 17 Edw. 3. 51. Co. Litt. 30. 2.

section; if, therefore, the sisters took interests for life only in joint tenancy, the husband could not be intitled to curtesy, and with this agrees the case in *Rolle* (p).

The term curtesy, according to Judge Blackstone, was probably derived from the husband's attendance at the Lord's court or *curtis*, in respect of his wife's real property. So soon as a child was born, the father began to have a permanent interest in the estate, became one of the *pares curtis*, did homage to the Lord, and was called tenant by the curtesy *inchoate*; and this estate being once vested by the birth of issue, was not suffered to determine by the subsequent death or maturity of the infant (q). An essential requisite of the husband's title is the actual seisin or possession of the wife (r); whence it follows, that of such things as are incapable of this seisin, there can in general be no curtesy, viz. of a mere right, title, use at common law, or a remainder or reversion expectant upon an estate for life, unless it determine during the marriage. But of advowsons, rents, commons, offices of profit, &c. there may be curtesy (s).

Of the mere *personal* inheritance of the wife, the husband will not be intitled to curtesy. Thus

(p) 2 *Roll. Abr. Curtesy*, 90. pl. 50. (q) 2 *Black. Com.* 126.

(r) *Keilw.* 2.

(s) *Co. Litt.* 29. b. *Perk. sect. 457, 463. Plowd.* 379. b.

if the wife be grantee of an annuity to her and her heirs, and have issue, the husband cannot claim it after her death as tenant by the curtesy.

Lands descend to the wife as heir in tail *general*, subject to leases for *years*; the wife dies before the terms expire, without receiving any rent, leaving a husband, and inheritable issue, the husband shall be tenant by the curtesy, for the possession of the lessees is considered the possession of the wife (*t*). But if *A.* be seized of lands which descend upon his daughter *B.*, who marries and has issue, and *B.* dies before entry, her husband shall not be tenant by the curtesy, because *B.* had only a *seisin in law* (*u*). \*And by parity of reasoning, if a woman be *disseised* while single, and then marries, but dies leaving issue, without any re-entry made upon her estate, the husband will not be intitled to curtesy, the wife having a *right* of inheritance only during the *coverture* (*x*); *contra*, when the *disseisin* is effected *after* marriage, for in that case the husband may re-enter after the wife's death, and hold the lands in curtesy (*y*); yet if a person seized of a rent or advowson in fee, have issue a daughter, who is married and dies, and then the daughter having issue, dies before the rent becomes due, or the living vacant, the

(*t*) 3 Atk. 469.

(*u*) Co. Litt. 29. a.

(*x*) Perk. sect. 458.

(*y*) Ibid. sect. 472.

husband shall have his curtesy, although the wife had a seisin in law only, for in this case *impotentia excusat legem* (z).

If the seisin of the wife be defeated by a prior title, the right of the husband to curtesy depending upon it will be also disappointed. Thus if the wife endow her mother, the husband's curtesy will be defeated *pro tanto*, unless the mother die before her daughter, in which case, if the husband re-enter, it should seem that his title to curtesy would revive, or be established; *similiter*, if the wife's possession be defeated by the birth of a posthumous son, and consequently the husband's claim to curtesy; yet if the son die without issue before the wife, and the husband re-enter, he will be intitled to curtesy (a).

In cases where the seisin of the husband and wife is defeated by unfair and improper means, and not recontinued during the marriage, the surviving husband will be permitted to recover the lands, and hold them in curtesy. Thus if husband and wife be seized of an estate in fee-simple in her right, and it is recovered against them by perjury, or erroneous process, and afterwards they have issue, and the wife dies, the

(z) Co. Litt. 29. a. Perk. sect. 468, 469. Keilw. 104. F. N. B.

149. Bro. *Curtesy*, 5, 9, 121.

(a) Bro. Tit. *Curtesy*, 10, 13.

husband shall have attaint or error, and when the proceedings are reversed, may enter and hold the lands as tenant by the curtesy (b). And if husband and wife levy a *fine* of her estate, which is afterwards reversed as to both for the wife's nonage, the husband will be intitled to curtesy, for by the reversal, the fine was void *ab initio*, and considered as if never levied (c).

An *equity of redemption* in the wife will intitle the husband to curtesy; for an equity of redemption is not considered a *mere right*, but an estate in the land, of which there may be a seisin, the mortgagor being looked upon as owner of the land; if, therefore, the wife's estate be mortgaged by her before marriage, and not redeemed during the coverture, the husband will be intitled to curtesy (d).

In general, legal and equitable interests receive the same construction, in order to preserve the rules of decision uniform and consistent; accordingly, if money be vested in trustees by testament to purchase lands, with a declaration of trusts, which would give the wife an *equitable* intail, although the money be not converted into real property during the wife's life, yet the

(b) *Perk. sect. 475.* (c) *Cro. Jac. 482. Cro. Eliz. 129.*

(d) *1 Atk. 603. 7 Vin. Abr. Curtesy, 156. pl. 23.*

husband will be intitled to curtesy (e). But if the intention be clear that the husband was meant to be excluded from taking any interest in the trust-fund, and the trust is *executory*, (i. e.) left to the direction of the Court of Chancery, the husband will not be allowed to claim any thing by curtesy. Thus if a devise were made to *A.*, in trust to convey to the use of the testator's daughter for life, so as she alone, or such person as she might appoint, should receive the rents thereof, and *so as her husband did not intermeddle therewith*, and after her death, in trust for the heirs of her body, the husband would not be intitled to curtesy (f).

We must notice, however, that even in *executory* trusts, the husband's right to curtesy can be disappointed only by indisputable evidence of an intent that it should never arise; accordingly, in a case where *A.* having two children, *B.* and *C.*, by a first husband, by articles, made prior to her second marriage with *D.*, gave to him during her life the interest of her money and the rents of her real estates, to which she was intitled under the will of her first husband, for maintaining the house, and educating their children, until *B.* and *C.* attained twenty one, or married; upon the happening of either of which events, *B.* and *C.* were to receive such

(e) 2 Vern. 536. 1 Ves. 174. (f) 1 Atk. 607. 3 Atk. 696, 716.

property in just proportions as they were intitled to as *lawful heir to their father*. — *A.* having died intestate, leaving *D.* her second husband, and *B.* and *C.* surviving, a question arose, whether *D.* was intitled to curtesy of the real estate, of which the wife died seized in fee, notwithstanding the articles, there having been inheritable issue of the second marriage? and Lord Hardwicke determined that he was; observing, that the scope and intent of the articles were only to regulate the whole estate of the wife in right of her first husband, as well the produce of the personal, as the rents of the real, for the maintenance of the house, and education of their children, and that the words shewed it intended to comprise the share of the wife's children likewise, until they attained twenty-one; but the estate given to the wife, was to determine upon their arriving at that age. That the transaction was nothing more than a contract in what manner the several funds should be applied, of which their estates consisted, and was never intended to abridge or disappoint the legal rights of the husband; therefore there was no reason to deny him curtesy (g).

It seems to have been the doctrine of the old law, that if the wife be an *idiot* the husband would not be intitled to curtesy; so that if lands descended to a *feme idiot*, who had issue,

(g) 3 Atk. 423, 427.

the husband entered, and then she was found an idiot by office; the king by prerogative, and not the husband by curtesy, would have been intitled to them (h). But as it seems agreed at present, upon principles of sound sense and reason, that an idiot cannot marry, she being incapable of consenting to any contract, this doctrine cannot now take place.

No curtesy is allowed of *copyhold* estates, unless warranted by a particular custom; but in manors where it prevails, although the wife die before admittance, yet the husband will be intitled to curtesy (i). This special custom being an exception to the general law of copyholds, is construed strictly; therefore, if the custom allowing the husband curtesy relate to women only who shall be possessed of *copyhold lands at the period of marriage*, it will not be extended to include such as may come to the wife *during coverture* (k).

By the custom of *gavelkind*, a husband may be tenant by the curtesy without the preliminary of having issue (l), but it is not so extensively beneficial as the common law right; for tenant

(h) Co. Litt. 30. b. Plowd. 263. 2 Black. Com. 127.

(i) Gilb. Ten. 287. Rep. 22. Hob. 216. Cro. Eliz. 361. Moor. 272. (k) 2 Leon. 109, 208.

(l) Co. Litt. 30. a. Dav. 50.

by the curtesy under this custom is only intitled to a *moiety* of the wife's estate, which ceases or is forfeited by his second marriage (m).

The issue must be born *alive* during the marriage; if, therefore, by the death of the wife in child-bearing, it is necessary to resort to the *Cæsarean* operation, the birth of such child will not intitle the husband to curtesy; because the issue not being born during the *coverture*, or the wife's life, the interest in the estate became vested in the child while in embryo, which will not be permitted to be divested for the husband's benefit; and in pleading he must allege that *he had issue during the marriage*, which in this case he cannot do (n).

It is sufficient if the issue be born at any period during the marriage, and it is immaterial whether they come into existence *before* the *seisin* of the wife or *afterwards*, or whether they be then dead (o). Thus if husband and wife have issue, and the issue die, and then lands of inheritance descend to the wife, of which she becomes seised by the entry of the husband; upon the wife's death the husband will be intitled to curtesy (p).

(m) Robinson Gavelk. B. 2, cap. 1.

(n) 8 Rep. 34. Co. Litt. 29. b. (o) Co. Litt. 29. b.

(p) Perk. sect. 473.

In cases where the estate in which the husband is intitled to curtesy, is intail, although such intail determine in his life-time by the death and failure of issue, he will notwithstanding be intitled to retain the lands during his life, and the same law prevails in respect of rents; therefore, if a rent be granted to the wife in tail, who dies without issue, living the husband, the rent will have a continuance *quoad* the curtesy of the husband (q).

The time of having issue may be material in some instances. Thus if *after* the birth of issue the wife be attainted of felony, the husband will be intitled to curtesy, although the wife can have no inheritable issue, and this in respect of the possibility the issue had of inheriting to their mother before the attainer; but if the wife had been attainted *prior* to issue born, the subsequent death of a child would not intitle him to curtesy, because such descendant could not possibly have been heir to the wife (r).

If the husband *after* having issue make a feoffment in fee, and then the wife dies, the feoffee shall hold the land during the life of the husband; because by the birth of issue he was intitled to curtesy, which beneficial right passed

(q) Co. Litt. 30. a.

(r) Ibid, 40. a.

by the feoffment (s); *pari ratione* the lessee of the husband may hold the demised lands during the husband's life; and if the feoffment were *conditional*, and the Baron entered for a breach, and then the wife died, yet the right to curtesy would be gone, as that was extinguished by the feoffment (t).

It also seems that if the husband alien by feoffment *before* issue born, and retake an estate in the lands to himself and wife, so that the latter is remitted, and then they have issue, the husband will not be intitled to curtesy, although his right to it had no existence at the time of the feoffment, but accrued afterwards upon the birth of issue: the reason appears to be this, that the husband by discontinuing the wife's estate committed a tortious act, so that her remitter should not be permitted to benefit him, by communicating a title by curtesy (u).

Feme tenant in *tail after possibility of issue extinct*, marries and has issue, and then the fee-simple descends to her, the husband shall be tenant by the curtesy, because by the devolution of the absolute inheritance in the lands upon the feme, the intail after possibility, &c.

(s) Co. Litt. 30. a. (t) Ibid. 30. b.

(u) Bro. *Curtesy*, 6. 1 Rep. 111. Hob. 338. Moor. 31. 7 Vin. Abr. 162. (Curtesy) pl. 2.

merged in the inheritance, and she became seized of an estate in fee-simple (x).

2. *The power allowed the husband over his wife's freehold estates.*

The common law imparted to the husband, as a necessary incident to the seisin he acquired of the wife's real estate by the marriage, the power of converting her interest in such estate to a *mere right* by alienation, so that her only remedy to recover possession of the lands was by *writ of right* (y); for the property of the wife during the coverture being vested in her and the husband indivisibly, the latter acquired the right of possession, which being conveyed away by her, the wife was not allowed, from the unity of their estate and interest, to consider the act of the husband a disseisin to herself, but was only permitted to contest the right; hence we have the import of the word *discontinuance*, viz. "the alienation of the possession, to the prejudice of the person having the *right of property, defeazable by action only.*"

The dilatory proceedings in writs of right induced the law to provide the wife with the writ of entry *cui in vita* (z); and now by a statute

(x) *Bro. Curtesy*, 4.

(y) 5 Edw. 3. 58. 2 Inst. 343.

(z) *F. N. B.* 193.

made in the reign of Henry the Eighth (*a*), an entry is provided for the widow, and those beneficially interested:—that act declares, “that no fine, feoffment, or other act, thereafter to be made, suffered, or done, *by the husband only* of any manors, &c. being the inheritance or freehold of his wife during the coverture, shall in any wise be or make a discontinuance thereof, or be prejudicial to the wife or her heirs, or to *such* as shall have *right, title, or interest* to the same, by the death of such wife; but that the wife, or her heirs, and such other to whom such right shall appertain after her death, may *enter* into such manors, &c. according to their rights and titles therein, any fine, feoffment, or other act of the husband notwithstanding, fines levied by the husband and wife (whereunto the wife is party and privy) only excepted.”

This being a *remedial* statute, courts of law have construed it according to the spirit and intention, and not according to the mere letter. Thus if husband and wife be seized of a *joint* estate in fee-simple, or in tail during the coverture, and he alien by feoffment, the wife or her issue may enter upon the lands after his death; but if the conveyance be by fine with proclamations, then she must enter within five years after

(*a*) 32 Hen. 8. cap. 28. sect. 6. explained by the 34 and 35. Hen. 8. cap. 22.

her husband's death, or she will be precluded by the statute of non-claim, and her issue cannot enter after her death, for they are barred by the fine (b). *Similiter*, if the wife be intitled to a reversion or remainder in tail expectant upon an estate tail in the husband, she may enter notwithstanding the feoffment or fine of her husband (c); but if the husband had suffered a recovery, the wife would have been barred and could not enter, for the act provides only for the entry of persons having lawful rights and titles in the property aliened; whereas the recovery destroyed the wife's right and title, and in so doing excluded her from the benefit of the statute (d). Yet if the husband procure himself to be impleaded upon a *feigned* title, and suffer a recovery without voucher, and permit execution to be had against himself and wife, this will be no bar to the wife, but she may enter (e).

Although the statute mentions feoffments made by the husband *only*, from which it might be inferred that a *joint* feoffment by the husband and wife was not within its provision, yet the contrary construction has prevailed; for the wife's joining in the feoffment being a void act so far as concerned her rights,

(b) 4 Hen. 7. Co. Litt. 326. a. 9 Rep. 140. b. Cro. Car. 477.

Hob. 260. Dyer, 351. b. (c) Co. Litt. 326 a.

(d) 8 Rep. 72. b. Touchst. 46. (e) Co. Litt. 326. a.

and not equivalent to a fine in which she is separately examined, the feoffment is in truth the sole act of the husband (*f*). Upon the same principle, if they had joined in a deed of *bargain* and *sale*, which was afterwards duly inrolled, the wife might enter after the husband's death, although she was a party to the deed.

Estates in remainder and reversion are within the general words of the act, so that if the wife neglect to enter, the next in remainder or he in reversion may do so as soon as his right to the possession commences (*g*).

It seems to have been the intention of the statute to provide only a speedy and easy remedy for the wife and her heirs, and the persons beneficially interested, when their rights to the possession, which had been discontinued, commenced, and by no means to accelerate such rights, and give them a power to enter sooner; therefore it should seem that neither the wife nor her heirs, &c. can enter upon the lands aliened during the husband's life (*h*). The writ *cui in vita*, provided for the widow to recover her estate discontinued by the husband, issued only at common law *after his death*, as the title of it imports, and her heir was not intitled before that period to the writ *sur cui in vita*. Now it may

(*f*) Co. Litt. 326. a.

(*g*) Co. Litt. 326. a.

(*h*) Moor. 58.

be inferred from Greneley's case (*i*), that questions relative to the entry of the wife, &c. under the statute, are to be determined with reference to their common law rights; for it is there said, that in all cases where the wife is intitled to a *cui in vita*, she may enter by the statute, implying, that in those instances where this writ did not lie, the wife could not enter under that provision. And it is also there stated, that when the issue cannot have a *sur cui in vita*, or *formedon*, he shall not enter within the remedy of the act (*k*). But if the husband and wife be divorced a *vinculo matrimonii* after the discontinuance of the husband, she may enter *immediately*, for the coverture is determined, the marriage contract dissolved, and the wife's right to the possession commenced from the completion of the divorce (*l*).

The statute does not extend to *irregular* entries, as Hobart terms them: if, therefore, the wife die without heirs after the husband's alienation of her estate, the Lord by *escheat* cannot enter under the authority of the act (*m*).

Copyhold lands are not included within the letter or equity of the statute, and, as it seems, without prejudice to the wife; for the husband

(*i*) 8 Rep. 72. b.

(*k*) Co. Litt. 326. a.

(*l*) 8 Rep. 73. a.

(*m*) Hob. 243, 261.

cannot *discontinue* the wife's estate by *surrender*, for nothing passes to the surrenderee but what the surrenderor may lawfully part with, so that if a husband seized of copyhold lands in right of his wife, surrender them to the use of another person in fee, this will be no discontinuance, but the wife may enter after her husband's death (n).

If the wife, after the death and the discontinuance of her husband, levy a fine *before* entry, the fine will so far strengthen and confirm such discontinuance as to prevent the remitter of the wife by entry under the statute; for notwithstanding the provision of the statute, the act of the husband is considered a discontinuance until she enter and defeat it, which entry she precluded herself from making by levying the fine (o).

Although the statute has altered the common law in favour of married women, and facilitated their remedy against the discontinuance of their husbands, it has at the same time provided for the encouragement of husbandry, by insuring to the lessees of husband and wife the lands during the terms granted. Thus by the above statute of Henry VIII. it is declared, that

(n) Gilb. Ten. 177, 189. Moor. 596. 1 Roll. Abr. 632. pl. 25.  
4 Rep. 23. (o) 2 Roll. Rep. 311. Cro. Car. 320.

the leases of baron and feme, of lands the inheritance of the wife, or their joint inheritance by purchase either before or after coverture, by indenture *for three lives, or twenty-one years*, sealed by the wife and made in their joint names, the rent reserved to both, and to the heirs of the wife, shall be good and obligatory upon her and her heirs (p).

The following requisites must attend the transaction: the lease must be by indenture and not by deed poll, or by parol (q), in the names of husband and wife (r), and commencing from the day or from the making thereof. It must not be dispusnitable of waste, either by express words or by construction of law; for if lands be demised to *A.* for life, remainder to *B.* for life, &c. the lease will not be pursuant to the statute; for if *A.* commit waste, no advantage can be taken of it at law during *B.*'s life (s). If there be an old lease in existence, it must be surrendered, expired, or ended, within a year of making the new one, and there must be only one lease in being either for years *or* for lives (t). The subject demised must be of lands, or of tenements, or hereditaments, out of which a rent may be reserved by law, and not of things

(p) *Touchst.* 280.

(q) *Cro. Eliz.* 656. pl. 20.

(r) *Cro. Jac.* 617. pl. 1. *Touchst.* 277, and seq.

(s) *Co. Litt.* 44. b. 53. b. 54. a. (t) *Co. Litt.* 44. b.

that lie in grant only, as fairs, markets, franchises, and the like; such lands, &c. must have been most commonly let to farm for twenty years before the making of the lease, by some person seized of an estate of inheritance (*u*); and so much yearly farm or rent must be reserved, or more, as has been most usually yielded or paid for the lands, &c. during the same period. And it seems that the demise of *part* of the estate commonly let to farm, with a reservation of the old rent *pro rata*, is good within the act; but if the whole of such lands be demised at the accustomed rent, together with another acre at an additional rent, this would not be considered a lease authorized by the statute, for the rent is entire and issuing out of all the lands contained in the lease, so that the accustomed annual rent cannot be said to be reserved, as part of it is made to arise out of an acre of ground which was never charged with it before (*x*).

A grant by copy of court-roll in fee, for life or for years, is a sufficient letting to farm within the statute (*y*); but we must observe, that the statute does not *warrant* or *authorize* grants by copy; and in instances where copyholds have been

(*u*) Co. Litt. 44. b.

(*x*) 5 Rep. 5. b. Co. Litt. 44. b.

(*y*) Co. Litt. 44. b.

granted

granted in such manner as to bring them within the provision of the act, the lease must *not* be made by *copy* as usual, but by *indenture* (z). *Gilbert*, Chief Baron, after considering the subject, draws the following conclusion:—"When a man is seized in fee of lands in right of his wife, or is tenant in tail in his own right, and some of his lands *have been granted by copy* for the space, &c. this is a sufficient demising within the act to warrant his demising them so as to bind the heir. But where a man is himself tenant in tail of copyhold lands, or is seized in right of his wife, he can make no lease to bind by force of the 32 Hen. VIII. because they are not to be made by surrender by virtue of that act, but by deed indented; and although, by licence of the Lord, a lease of copyhold may be made by deed indented, yet the estate is not originally so grantable, to which only the statute extends" (a).

It has been determined, that not only the wife and her heirs may avoid a lease not made pursuant to the statute, but any person who becomes possessed of the estate from her.

Thus if Baron alone demise the wife's estate, and afterwards both levy a fine, and die, the

(z) Gilb. Ten. 180.

(a) Gilb. Ten. 179. 6 Rep. 37.

conusee may avoid the lease (*b*). But if the husband and wife in her right and *B.* are joint tenants of lands for the lives of the wife and of *B.*, and husband and wife demise their moiety by indenture for 21 years, and the latter dies, *B.* the surviving joint-tenant cannot enter and defeat the demise, as the lease is voidable only by the wife, or one who claims *in privity* of her, which *B.* does not (*c*).

Although the leases of baron and feme are not made according to the letter and intention of the statute, yet they are not absolutely void against the latter, but voidable only by entry; so that if the wife happen to survive her husband, and do not determine the contracts by entry, or if she or a second husband receive rent, &c. the leases will be confirmed (*d*). But if leases be made by the husband alone, and he dies; acceptance of rent by the wife will be no confirmation, because she was neither a party nor privy to them (*e*).

(*b*) 1 Roll. Abr. 388. pl. 50. Cro. Eliz. 216. 2 Rep. 77. b.  
Bridgm. 45. (*c*) Cro. Jac. 417.

(*d*) Br. cui in vitâ, pl. 1. Plowd. 137. b. Dy. 159. Marg. pl.  
36. Cro. Jac. 332. Cowp. 201

(*e*) Br. (Accept.) pl. 6. and (cui in vitâ) pl. 1.



3. *The*

3. *The husband's interest in his wife's personal estate.*

Marriage is an absolute unqualified gift to the husband of all the goods and chattels which the wife was actually possessed of at that time in her own right, whether he survive her or not (f). But of such goods and chattels as belonged to the wife in *autre droit* as executrix or administratrix the marriage is no gift (g), as such a construction might prove disadvantageous to the creditors, &c. of the testator or intestate; however, although the marriage does not give the husband the property that his wife is possessed of as executrix or administratrix, it enables him to administer in her right, and consequently to dispose of it by sale or otherwise as an incident to such power (h).

With respect to such part of the wife's personal estate as is not in her possession, viz. debts owing to her, contingent interests, portions due to orphans in the hands of the Chamberlain of London (i), money owing to the wife on account of intestacy, and the like; of such estate,

(f) Moor. 25.

(g) Co. Litt. 351. a. 11 Mod. 177.

(h) Cro. Jac. 318. 2 Black. Rep. 801.

(i) 2 Ventr. 341.

the marriage is only a qualified gift to the husband, (i. e.) upon condition that he reduce them into possession during the coverture, which will be effected either by his receipt of the money himself, or by the hands of another person properly authorized for the purpose (k); for if he happen to die before his wife without reducing such property into possession, she, and not his representatives, will be intitled to it (l). But if the husband survive the wife, he will in that event be *immediately* intitled to every thing that belonged to her *in possession* (m); and he may recover and enjoy such estate as continued in action at ~~her~~ death, as her administrator, for his own use (n).

Two single women are joint-tenants of a lease for years, one of them marries and dies, the term shall survive to the other joint-tenant; for although chattels real are given to the husband if he out-live the wife, yet the survivorship between the joint-tenants was the elder title; and after the marriage the feme continued solely possessed, no act being done by the baron to sever the joint-tenancy, and reduce a moiety of the term into his own possession (o).

(k) Roll. Abr. 342, 350. Moor. 452. Gold. 160.

(l) Co. Litt. 351. b.

(m) 1 Roll. Abr. 345. pl. 40. Dyer, 251. 3 Leon. 9.

(n) 29 Car. 2. cap. 3. s. 25. 1 Roll. Abr. 345. pl. 35.

(o) Co. Litt. 185. b. Plowd. 418. b.

If the husband, surviving the wife, die before he could possibly recover the whole of her contingent personal estate, or so much of it as rested in action, his next of kin, and not those of the wife, will be intitled to administration (p). And if the wife's relations at the husband's death procure administration *de bonis non* of her estate, they will be considered trustees for the husband's next of kin, or personal representatives (q).

Husband seized of a rent-charge in right of his wife, the rent becomes due, and then the wife dies, the husband shall have the arrears; but if the wife had been the survivor, she, and not the executors or next of kin of the baron, would have been intitled to them (r).

As the husband is allowed to reduce into possession the out-standing personal estate of his wife, and make it his own, it will amount to the same thing if he dispose of it to another. Thus if *baron*, possessed of a term for years in his wife's right, or jointly with her, dispose of it by a complete act in his life-time, the alienation will be good against the wife and all claiming under

(p) Harg. Law Tracts, 475.

(q) 1 P. Will. 378, 381. 1 Atk. 458. 3 Atk. 525.

(r) Co. Litt. 351. a.

her (s). The law is the same if the wife be intitled to the *trust* of a term only (t), except such trust be created by herself prior to the marriage with the privy and consent of her husband, and then his subsequent disposition will not be allowed in equity to defeat her interest; but it seems necessary that he should be privy to the transaction, or it may be construed a fraud upon him, and therefore void (u). If, however, the wife settle her estate upon the children of her former marriage before the second was *in contemplation* or *in treaty*, such settlement cannot be defeated by a subsequent husband as fraudulent, because no fraud could be committed against him at the time of the transaction, as he was not then in consideration, and the wife might be doing a prudent action in providing for her children by the first husband before she came under the power and controul of the second. A., before her second marriage, assigned over the greatest part of her estate to trustees, as a provision for her children by the first husband: question—Whether the transaction was valid against the second? And the court determined that the settlement was good (x).

(s) Co. Litt. 46. b. 351. a. 1 Roll. Abr. 343. pl. 15.

(t) Roll. Abr. 343. Lane, 54, 55. Ch. Ca. 225. Vern. 7, 18.

2 Vern. 270. Eq. Ca. Abr. 58. Pre. Ch. 419.

(u) 1 Roll. Abr. 343. pl. 30. 2 Vern. 17. 2 Ch. Rep. 41, 42.

2 P. Will. 533. 2 Frem. 29.

(x) 1 Vern. 408. accord. 2 P. Will. 674. 2 Bro. C. C. 345.

Husband possessed of a term for forty years in right of his wife, leases for twenty, reserving rent, and dies, the wife shall have the residue of the term (*y*), and the executors of the husband the rent, the husband's alienation for twenty years being a good disposition of the term *pro tanto* for his own benefit, and the rent is not incident to the reversion, the wife being no party to the lease (*z*).

If the husband alien the whole of a term of which he is possessed *in jure uxoris*, upon condition that the grantee pay a sum of money to his executors, and then the husband dies, and the condition is afterwards broken, upon which his executors enter on the premises, this alienation by the husband will be a sufficient disposition to bar the wife of her interest in the term, it being totally vested in the grantee (*a*). It seems, however, that if the condition had been broken during the life of the husband, and he had entered for the breach, and then died before his wife without making any disposition of the term, she would have been intitled to it by survivorship; and for this reason, by re-entry the husband was restored to the same right and interest in the term as he was possessed of at the

(*y*) Plowd. 418. Cro. Eliz. 33, 279. 1 Roll. Abr. 344. pl. 30.

(*z*) Co. Litt. 46. b. Poph. 145.

(*a*) Co. Litt. 46. b.

time of the grant upon condition, (viz.) *in jure tutoris*; therefore, as he took no other step to alter his right in the term, it appears but reasonable that the wife's title by survivorship should be allowed in this instance as in general cases (b).

A woman, lessee for years, takes a husband, and he afterwards purchases a new lease of the same lands for the lives of himself and wife, this is a surrenders in law of the first term, and shall bind the wife, because it amounts to an actual disposition of it (c).

A lease was granted to baron and feme for a term of years; they entered, and then the lessor enfeoffed the husband, who died seized in the life of his wife, upon which she claimed the term against the husband's heir. The question was, Whether the term was extinguished? And it was determined, that acceptance of the feoffment destroyed the term, and defeated the wife's title to it, and that by the feoffment the husband admitted the lessor's power to enter and make livery, which the lessor could not do during the continuance of the term; therefore *ex necessitate* the admission by the husband amounted to a surrenders of the term (d).

(b) Bac. Abr. Tit. Baron and Feme (c). page 287.

(c) 2 Roll. Abr. 495. pl. 50. (d) Cro. Eliz. 912.

It seems that the husband's power of disposition over his wife's contingent personal estate, can extend only to such part as he may probably become possessed of during the marriage, and not to any part of her estate which depends upon a contingency that *cannot possibly* happen during his life. Thus if a lease be made to baron and feme for their lives, with remainder to the *executors of the survivor*, and the husband disposes of the term, and dies, the disposition will not bar the wife, for during the coverture she had a *possibility* only, and no interest (e).

*Feme sole* possessed of a chattel real is *dispossessed* thereof, and then marries, she dies in the life of the husband, he having done no act to recover possession of the chattel during the marriage; although he survived the wife, her executors will be intitled to it, the interest of the wife during the coverture being converted into a mere right by the dispossession, which is not given to the husband (f).

If the husband do no other act to dispose of such estate than merely by *testament*, the right of the wife will disappoint the bequest, because

(e) Co. Litt. 46. b. 1 Roll. Abr. 344. 2 Roll. Abr. 48. Poph. 5. 4 Leon. 185. Godb. 139. Cro. Eliz. 841. Hutt. 17.

(f) Co. Litt. 351. 2.

her right by survivorship commenced prior to the will taking effect to alter the property (g). But if the husband be possessed of a lease for forty years, and demise the lands comprised in it for twenty, *to commence after his death*, this will bind the wife surviving for so much of the original term as is under-let (h); so note the diversity between an act complete in itself, and operating *in præsenti*, and a testamentary disposition that is inefficient before the testator's death.

It seems, that if there be a dispute between the husband claiming a term in right of his wife and another person relative to their *title*, and they refer the question to arbitration, and an award is made in favour of the husband, the property in the term will be altered by the arbitrament, and belong to the husband's representatives, although the wife survive him (i). Accordingly, in *Truslowe v. Yewre* (k), it was said to have been agreed, that if a controversy arise between two persons about the *title* to a lease for years, and they submit the matter to arbitration, and the arbitrators award that one of them shall have the term, this is a good gift of the interest in it (l). But if the award be, that

(g) *Co. Litt.* 351. a. (b) *Poph.* 5. 97. 145. 1 *Roll. Abr.*

344. pl. 40. (i) 1 *Roll. Abr.* 245. 1 *Vern.* 396.

(k) 2 *Leon.* 104. *Cro. Eliz.* 223. S. C.

(l) 12 *Aff.* 25. 14. *Hen.* 4. 19. 24.

the

the one shall permit the other to enjoy the term, it is no gift of the interest therein.

A disposition *in law* of the wife's term is equivalent to an express alienation by the husband; accordingly, it may be *extended* for the debts, and *forfeited* for the crimes of the husband (*m*). But if the husband grant a *rent*, *common*, &c. out of such term, and die during the wife's life, the grant will be defeated. The reason is, the term being permitted to come to the wife entire, she claims paramount to the husband by survivorship (*n*).

It is necessary that the husband sue in his own and wife's names for such part of the personal estate of the latter as at the period of the marriage, or afterwards, could not be recovered without action. And it is a rule of law, that if the husband die after action brought and judgment obtained, but before execution, the surviving wife, and not the husband's next of kin, shall be intitled to the benefit of the judgment, and of consequence to the thing to be recovered by it (*o*); however, the husband may sue alone for all the personal estate in action that accrued

(*m*) Co. Litt. 351. a. 1 Roll. Abr. 851. Lane 54.

(*n*) Co. Litt. 351. a. Plowd. 418. b. 1 Roll. Abr. 344. pl. 21. Ibid. 346. pl. 17. 20. 2 Roll. Abr. 157. pl. 30. (*o*) Sid. 229. 1 Keb. 440. 2 Keb. 89. 3 Term. Rep. K. B. 627.

to the wife during the *coverture* (*p*), and for such of her chattels real as they may happen to be dispossessed of, and this seems to be the most eligible method for him to adopt. For if husband and wife are ejected of a term, which he enjoyed in her right, and the husband brings an *ejec<sup>tio</sup> firmæ in his own name*, and recovers judgment, this recovery will effect an alteration in the term, and vest it in the husband (*q*); *contra* if he had joined his wife's name in the ejection, and she had survived him. In like manner, if the husband bring an action in the names of himself and wife, to recover a sum of money due to her upon a bond given during the marriage, and he die after judgment, it will survive to the wife, and she, and not the representatives of the husband, will be intitled to a *scire facias* upon such judgment (*r*).

The practice of courts of equity corresponds with the legal rule, for the wife will be intitled to the benefit of a decree, made in their favour, in a joint suit, if the husband die after it is pronounced, and before the effect of it be obtained (*s*).

The principle of the rule appears to be this—

(*p*) Owen 82. 2 Mod. 217. 1 Stra. 230. 2 Stra. 726.  
4 Term. Rep. K. B. 616. (*q*) 1 Roll. Abr. 345. pl. 10.  
Co. Litt. 46. b. (*r*) 1 Vern. 396. 2 Vern. 677. (*s*) 1 Ch.  
Ca. 27. 1 Ch. Rep. 234. 3 Atk. 20.

until

until the husband shew an intention to alter the nature of his wife's property and make it his own, which is presumed when he commences an action for it *in his own name alone*, the right belongs to the wife; but when he joins her unnecessarily in the means adopted to recover such estate, no inference arises that he intends to defeat her interest by the substitution of his own, so that his death after judgment, and before execution, will not be allowed to prejudice the interest of his wife (t).

Baron possessed of a term for years *in jure uxoris*, with remainder to *himself* in *fee*, *bargains and sells* the lands comprised in the term by deed enrolled, in consideration of money, and dies; feme enters, claiming the unexpired term, and the question was, whether she was intitled to it? and it was determined in the affirmative. For by the bargain and sale nothing passed but a use, and by creation and grant of the use, the term which the husband had *in jure uxoris* shall not pass, so that this being no disposition of the *legal* interest of the term, but only of a use (which, in respect of his inheritance in remainder, he might well create); this was good as to the term, during the life of the husband only, and then the wife after his death shall have the lease discharged of it, as if the

(t) 2 P. Will. 496.

G 2

husband

husband had granted a rent, &c. out of the term; but if there had been the words *grant*, *assign*, or any other word which would have passed the legal interest of the term, this would have barred the wife; but the words *bargain* and *sell*, by 27. Hen. 8. c. 16. could have no operation to raise an use, which shall be executed in possession, but only out of the reversion of which the husband was seized, as the statute speaks; and therefore this being a term in gross, whereof the husband was *not seized*, but only *possessed*, the bargain and sale passed only a use at common law, and not by virtue of that statute, and then not being executed in possession, the use at common law, which was collateral to the land, fell off with the death of the husband, who created it, as other collateral charges of his would do, and by consequence, the wife's title to the residue of the term continues good. But if the husband had been possessed of such term in gross, in his own right, without an inheritance in him, and had made a bargain and sale thereof, though this would not have been executed by the statute in possession, for the reason before mentioned, yet it would have passed a use at common law, which would have made him a trustee in equity for the bargainer (u).

Such is the husband's legal interest in, and

(u) 1 Bac. Abr. Tit. Baron and Feme, page 288.

authority

authority over, the personal estate of the wife, in possession, in action, and in contingency. In *equity*, however, this interest and authority have been considerably modified under particular circumstances. A *settlement* made upon the wife in contemplation of marriage, and in consideration of her fortune, will intitle the representatives of the husband, although he die before the wife, to the whole of her goods and chattels, whether reduced into possession or not, during the *coverture* (v). The principle is equality (viz.) that as the wife has consented to accept a certain provision by settlement, so the husband in consideration of such provision shall be intitled to receive the whole of her fortune.

Husband, by an obligation given to trustees, reciting that his intended wife's fortune amounted to about 500*l.* agreed to pay her annually 10*l.* for her sole and separate use, and that if he survived her, she should have the power to dispose by will of 100*l.* her wearing apparel, watch, rings, and jewels; but if she happened to be the survivor, then he stipulated to *leave* her 200*l.* and all her wearing apparel, &c. to be at her sole disposal; and for better securing the premises, he agreed to settle lands of the annual value of 12*l.* upon request. The wife being intitled to a debt of 200*l.* secured by bond given to her *dum sola*, the question was between the

(x) Gilb. Eq. Rep. 100.

surviving wife and the residuary legatee of the husband, whether this bond debt, as a chose in action, and not reduced into possession by the husband, was the property of her or of the residuary legatee; and the determination was in favour of the latter (y).

It seems to be the better opinion, that in cases where the provision for the wife is not made in consideration of her fortune, or is made in consideration of a *particular part* of it only, the husband will not, in the first case, be intitled to the wife's *chooses in action*, unless he survive her; and, in the second, to no more than is comprised in the contract.

A woman, at the time of her marriage, was intitled to 300*l.* as a portion in her brother's hands, secured by his bond, a settlement of a farm was made upon her for her jointure, by the husband's father and grandfather, which settlement was expressed to be made, *in consideration of 100*l.* paid to the grandfather, as the wife's marriage portion*, which was accordingly paid by the brother. Question, Whether the wife surviving the husband was intitled to the remainder of the bond debt? And the Chancellor, on appeal from the Rolls, was of opinion in favour of the wife, unless it appeared upon a

trial at law, which was directed, that the husband was intitled by *agreement* to the remaining 200*l.* secured by the bond; and his Lordship said, that if the settlement had been in consideration of the whole portion, and had been equivalent to it, that would have amounted to an agreement that the husband should have had it (z).

Feme, intitled to a rent-charge of 300*l.* a year under a marriage settlement, having survived her first husband, takes another, but previous to the marriage a settlement was made, by which, in consideration of such intended marriage, and for providing and settling a competent jointure and maintenance for the wife, and for making a proper provision for the children of the marriage, certain estates were conveyed to trustees, for those *purposes*, a further settlement was made by the **husband** of 4000*l.* The husband died before the wife, at which time an arrear of 1098*l.* being due in respect of the rent-charge, a question arose, whether the wife was intitled to that sum? And it was determined by Lords Commissioners *Bathurst* and *Aston* in her favour, upon the principle, that a *mere settlement* on marriage was not competent to create a gift to the husband of his wife's personal estate, but that in order to intitle him to it, there must

(z) *Pre. Ch. 63.*

be

G 4

be an *agreement, either express or implied* (a). In *Blois v. the Countess of Hereford* (b), a provision was made for the wife, and no notice taken of her personal estate, and yet a decree was made in favour of the husband's representative; the Lord Keeper observing, “that in all cases where there was a settlement *equivalent* to the wife's portion, it is to be intended that he is to have the portion, although there be no agreement for that purpose.” But this *dictum* and case seem to be over-ruled by that stated last preceding it; and Lord Commissioner Aston, in referring to *Blois v. Hereford*, said it was a *strange report.*

In the above cases, we must notice that the settlements were made *before* marriage, at a time when the wife had a legal capacity to contract with her husband in respect of her property; if, therefore, an actual agreement be necessary to give the husband the *chooses in action, &c.* of the wife, in consideration of the provision made by him for her, as the principal authorities appear to require, it seems to be a consequence that a settlement made *after* marriage will not intitle the representatives of the husband to such estate in preference to the wife. Upon this reasoning Lord Hardwicke seems to have pronounced his decree in (c) *Lanoy v. the Duke of Athol*, (viz.)

(a) Ambl. 692. See also 2 Ves. Jun. 607. 2 Ves. 676.

(b) 2 Vern. 501. (c) 2 Atk. 444.

that

that although the husband on accession to an increase of fortune in right of his wife, in consideration of it made an additional provision for her by settlement *after* marriage, his representatives were not intitled to the *chooses in action* belonging to her, which were outstanding at his decease, upon the principle, that the settlement was *voluntary*, and the wife at the time of making it under the disability of *coverture* (*d*); for the same reason, any *extra judicial* agreement entered into between the husband and wife, relative to her property, will be of no effect (*e*).

If the husband be obliged to resort to a court of equity to recover the *chooses in action of the wife*, that court will not interfere, unless he will submit to dispense equity before it be administered to him, (viz.) it will not act on his behalf, unless he submit to make a competent settlement upon the wife, when no settlement has been made (*f*); but if the wife consent in court, or being abroad, before proper commissioners there, that the husband shall receive her fortune, he will be ordered payment of it accordingly (*g*). This seems to have been strongly adhered to by a decree of Lord Hardwicke: a petition was presented on behalf of husband and wife,

(*d*) *Ibid.* 448. (*e*) 4 *Ves.* Jun. 15.

(*f*) 2 *P. Will.* 641. 3. *P. Will.* 12. 202.

(*g*) 2 *Atk.* 67. 2. *P. Will.* 638. 2 *Ves.* 60. 2 *Bro. C. C.* 663.

3 *Bro. C. C.* 195. 565. *Vide* 2 *Ves.* 579. *contra.*

that

that 860*l.* left by will *in trust for the wife and her heirs, to be laid out in the purchase of lands,* might be paid to the husband, instead of being so invested; and it was directed according to the prayer of the petition (*h*). If, however, the wife be the subject of a foreign state, by the law of which the husband would be intitled to the whole of her property, without making any provision for her, this circumstance will render her consent to the husband's application for her fortune unnecessary (*i*).

The equity of the wife to compel the husband to make a settlement is merely *personal*. Accordingly, if she be intitled to an equitable interest, and dies, leaving a husband and children, the latter being unprovided for by settlement, and the husband files a bill to recover such interest, the children cannot oblige him to make provision for them out of it (*k*).

The husband is, in general, intitled to the annual produce of his wife's property, whether he submit to make a settlement upon her or not, as a recompence for her maintenance in the mean time (*l*); and in cases where they are not legally separated, if the husband be willing, and offer to maintain her, but she refuses to re-

(*h*) 3 Atk. 71. (*i*) 3 Ves. Jun. 323. (*k*) Ambl. 509.  
(*l*) 2 Ves. 562.

side with him, and he applies for the interest of her fortune, although she may resist the application, the court will order payment of it to him (*m*), except in cases where he has misbehaved himself, as in instances where he has received a considerable part of his wife's portion, so as to leave but a small part remaining, and then refuses to make an adequate settlement upon her; in such instances, Lord Hardwicke said, the court would not only stop payment of the residue of her fortune, but even prevent the husband from receiving the interest of that residue, that it might accumulate for the wife's benefit (*n*); and in (*o*) *Like v. Beresford*, the husband having eloped with and married a ward of the Court of Chancery, both the principal and *interest* of the wife's fortune were directed to be settled upon her, for her sole and separate use, during the joint lives of herself and husband, with a contingent interest in his favour, upon the event of his wife's death during his life without issue; and making any appointment of her property; and this settlement was directed and enforced, although the husband had made a previous assignment of such property for a *valuable* consideration.

If the husband can obtain at *law* the property of the wife, equity will not interfere to restrain

(*m*) 4 Ves. Jun. 15. 20. 798. (*n*) 3 Atk. 21.

(*o*) 3 Ves. Jun. 506.

him from exerting that right (*p*); however, the Court of Chancery has restrained him from proceeding in the Ecclesiastical Court to obtain his wife's portion, from the inability of the latter court to compel a settlement (*q*); but if the demand be purely equitable, the claim of the wife is so strong, that payment of the money due to her into court, or payment by her trustee after bill filed (*r*), or an alienation of it by the husband, either *voluntarily* or for *valuable consideration*, will not defeat such right. It is true, that in *Worrall v. Morlar*, and *Bushman v. Pell* (*s*), Lord Thurlow inclined to the opinion, that the wife's equity would not prevail against the assignee of the husband for valuable consideration, but that opinion seems to have been shaken, and upon principle. In *Jewson v. Moulson* (*t*), Lord Hardwicke refused to order payment to the husband's assignees for valuable consideration of personal estate, to which the wife was intitled under her father's will, and recommended them to agree to a settlement of part of the money upon the wife and her children, which was assented to, and done accordingly—his Lordship observing, “that he laid great weight upon the assignment comprehending the *whole* of the wife's portion, and that if

(*p*) 2 Atk. 420. 514. 2 P. Will. 641. 1 Ves. 538. 3 Bra. C. C. 195. (*q*) Pre. Ch. 548. 2 Atk. 420. Toth. 114. 1 Atk. 491. 516. (*r*) 4 Ves. Jun. 15. (*s*) 1 P. Will. 459. in notis. Cox's Ed. 5. (*t*) 2 Atk. 417.

he allowed that practice to prevail, it would trip up all the care and caution of the court; for a husband then would have nothing to do but to take up money of a third person, and though neither he nor the lender knew exactly at the time what the fortune was, yet he might assign it over, and so defeat the care of the court entirely." This opinion of Lord Hardwicke was adopted by Lord Northington, in (u) *Mason v. Wenman*, and in (x) *Like v. Beresford*, (y) *Pryor v. Hill*, and (z) *Macaulay v. Phillips*, the court gave opinions agreeable to those of Lords Hardwicke and Northington. In the case last referred to, the Master of the Rolls expressed himself to the following effect: "Many cases upon this point have been before me, which have put me under the necessity of considering very much the right of the wife, and I am clearly of opinion, the doubt respecting the assignment of the husband, for a valuable consideration, of the wife's equitable interest, was not well founded, with the single exception, perhaps, of a *trust of a term for years* of land, upon which, perhaps, there may be some doubt; but subject to that, I am clearly of opinion, an assignment for a valuable consideration will not bar the equity of the wife, and it would be

(u) 1 P. Will. 459. in notis, Cox's ed. 5.

(x) 3 Ves. Jun. 511. (y) 4 Bro. C. C. 139.

(z) 4 Ves. Jun. 19.

strange if it did, since in the courts of law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined, that an action does not lie, and the reason given is, that it would totally defeat the wife's equity. It would be whimsical then that the assignment by the husband, for valuable consideration, should put that assignee in equity in a better situation than the husband himself is in at law. The guard of this court, upon the wife's interest, would be very singular, if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion, it was only a doubt (a), and it never was decided that the husband could by such assignment, or any other means, deprive her of her equity."

The reason why the *trust of a term* is probably made an exception to the rule, depends upon the disposition of such a term being good at law, and in order to preserve an unity of decision in both tribunals (b); for the same reason it seems that an assignment by the husband of his wife's mortgage term will bind her (c).

(a) 3 P. Will. 199. 2 Atk. 207. 549. 1 Bro. C. C 44. 51.

(b) 1 Vern. 7. 4 Ves. 19. suprà. 2 Atk. 421.

(c) 2 Atk. 207,

It appears to be a question not quite settled, whether a *voluntary* assignment of the wife's choses in action, or contingent personal estate by the husband, will change the interest in them, and impart a title to the assignee, subject to the wife's equity for a settlement; however, the better opinion seems to be, that the alienation must be for *value*, the court leaning as much as possible to protect the interests of married women (*d*).

Assignees in *law* are also bound by this equity of the wife to have a settlement made out of her fortune. If the husband, therefore, become a bankrupt, his assignees will be obliged to make provision for the wife, before they will be permitted to receive her property; and the reason is, that as the assignees derive their title from the bankrupt, they must be considered precisely in the same light with him, and subject to such equity or claim as other persons have upon him, in respect of any part of his estate (*d*). If the husband can procure the debtor of the wife to pay the money, so as to render his application to a court of equity unnecessary, there is no case in which it has interfered in favour of the wife; for in these instances there is no opportunity for the court to impose equitable terms upon the husband, as he does not seek any favour for himself (*f*).

(*d*) 1 Atk. 280. 2 Atk. 208. 549. 621. 1 Bro. Ch. Ca, 44.

(*e*) 1 P. Will. 382. 2 Ves. Jun. 607. 680. 3 Ves. Jun. 166, 421.

**SECOND**—*In treating upon the second head of my subject, I shall pursue the method I have adopted in considering the first.*

**1. The interest that the law gives the wife in the husband's real estates.**

**Dower.**

Dower is the provision that the law has made for the support of the wife, and the nurture and education of the younger children (g).

The subject naturally falls under a five-fold consideration: first, who are entitled to dower—second, of what estate—third, in what manner—fourth, the remedy for it—and, fifth, how it may be barred or prevented.

**First. Who are intitled to Dower.**

In order to entitle a wife to this legal provision, she must be the *actual* wife of the man at the time of his death (h); thus, if she live a-part from him, under a sentence of divorce, a *vinculo matrimonii*, she will be barred of dower, because the marriage was legally dissolved at the man's

(f) 1 P. Will. 458. 1 Ves. 538.

(g) Bract. lib. 2. c. 39. sect. 4. Co. Litt. 30. 2 Black. Comm. 130. (h) 1 Leon. 53. Perk. sect. 304.

death (*i*); *sed contra*, if the divorce be a *mensa & thoro*, except for adultery (*k*), for the marriage contract stills remains in force.

A marriage duly solemnised where the parties happen to be, though not in *England*, will intitle the widow to dower, as in *Scotland*, or in parts beyond the feas, for such marriages are valid (*l*). And in *Compton v. Bearcroft*, on appeal to the delegates (*m*), a marriage in *Scotland* between two *English* subjects, the appellant being under age, and having eloped with the respondent without the consent of her guardian, was held good.

The widow must be above *nine* years old at the husband's death, or she will not be intitled to dower. The reason assigned is, *quia junior non potest dotem promereri neque virum sustinere* (*n*); but this doctrine of nonage is applicable to the wife only, for though the husband be under the age of nine years at his death, the wife having then attained that age, shall be endowed (*o*). It is not necessary that the woman

(*i*) 2 Black. Com. 138.

(*k*) 13 Edw. 1. cap. 34. 10 Edw. 3. 15. Co. Litt. 32. 2.  
18 Edw. 4. 29. Godb. 145. (*l*) 2 H. Black. Rep. 145.

(*m*) 1 Dec. 1768.

(*n*) Litt. sect. 36. Co. Litt. 33. a. 1 Roll. Abr. 675.

(*o*) Co. Litt. 33. a.

should be nine years old at the time of marriage, for if she were then of the age of seven years only, and survived nine at the husband's death, she would be intitled to dower. *A.* marries *B.* of the age of seven years, and aliens his lands of inheritance, *B.* arrives at her ninth year, and her husband dies; she shall be endowed of the lands aliened (*p*).

As the wife will be intitled to dower at so early an age as nine years, so she will be intitled to dower, although the marriage take place in the *hundredth* year of her age, because the law cannot fix upon the precise period when her capability of having issue determines. Sir Edward Coke mentions an instance within his knowledge, of a woman having a child after she attained her sixtieth year (*q*).

If the wife *elope* from her husband and live with an adulterer, or if she be taken away by violence, and afterwards consents and remains with such a person, this will forfeit her right to dower. But if he be reconciled to her without coercion, and permit her to cohabit with him, her right to dower will be revived (*r*). If the

(*p*) Co. Litt. 33. a.

(*q*) Co. Litt. 40. a and b. 1 Roll. Abr. 675. pl. 10.

(*r*) 1 Roll. Abr. 680. pl. 20. 2 Inst. 435. Co. Litt. 32. a and b. Perk. sect. 305. 354. F. N. B. 150. 13 Rep. 23.

relations

relations of the husband detain him from his wife, so that she is ignorant what is become of him, and they pretend that he is dead, and procure his wife to release all marriages and interest that she may have in him as her husband, and, moreover, persuade and induce her to marry again, she having no notice of her husband being alive, although the man with whom she cohabits have notice of her husband being living, and although she in truth lives in adultery with such man, she will not forfeit dower, because *non reliquit virum sponte*, as mentioned in the statute of Westminster the second (s). Hence it seems that elopement was no forfeiture of dower at common law.

Husband attainted of treason, or petit treason, the wife shall not have dower (t), except in cases expressly provided for by act of parliament (u), and in cases where the attainer is reversed for error (w). But if the crime were *misprision* of treason, murder, or felony, the wife may claim dower, the rigour of the common law being mitigated by the statutes referred to in the notes (x).

(s) 13 Ed. 1. cap. 34. Roll. Abr. 680. pl. 30.

(t) Stanf. pl. Cor. 195. 2 Black. Comm. 130. Co. Litt. 37. a. 392. b. (u) 5 Eliz. c. 11. 18 Eliz. c. 1. 8 and 9 Will. 3. c. 26. 15 Geo. 2. c. 28. (w) Moor. 639. (x) 1 Edw. 6. c. 13. 5 and 6. Edw. 6. c. 11. et vide Co. Litt. 392. b.

The rule of the common law was founded in tenure, (viz.) the condition annexed to feuds, that the commission of such crimes by the feudatory should be a forfeiture of his estate. However, by the common law, if the husband committed *suicide*, and was found *felo de se*, his wife would be intitled to dower (*y*), because the act did not amount to a forfeiture of the baron's freehold, or lands of inheritance; and forfeiture for felony accrues only upon attainder, which cannot happen to a *felo de se* (*z*).

If the feme be an alien, she will be excluded from dower, except she be *queen consort*, or married by licence of the king; for by policy of law, no alien is capable of holding lands (*a*). Thus if a man marry an alien, and then dispose of his lands, and the wife is made denizen, and the husband dies, she cannot be endowed of the estates sold, because *denization* has no retrospect, and her capacity to be endowed originated from the circumstance of denization alone. The law would have been otherwise if the wife had been *naturalized*; for naturalization unqualified has reference to the time of the party's birth, and places him or her in most respects in the same state as if actually born within the king's allegiance (*b*).

(*y*) *Plowd.* 261. (*z*) *3 Inst.* 55. (*a*) *2 Black. Com.* 131.

(*b*) *Co. Litt.* 33. a. *1 Black. Com.* 374.

By a special act of parliament not printed, it is provided, that thenceforth all women aliens, who should be married by *licence of the king*, should be intitled to dower in the same manner as English women (c).

Feme attainted of felony cannot, during the continuance of the attainer, claim dower. Thus if the husband dispose of his lands, and his wife is afterwards attainted of felony, her title to endowment ceases; but if she obtain pardon before the husband's death, her right is revived, and she may claim dower in the lands sold (d).

Outlawry of the husband in trespass, or in any civil action, attainer of heresy, or excommunication, will not defeat the wife's right to dower, for neither forfeiture of lands, nor corruption of blood, is effected thereby (e); and Sir Edward Coke asserts, in the passage of his *Commentary* last referred to, that the husband's attaint in *premunire* shall not bar his widow of dower; although his lands and tenements, goods and chattels, are forfeited to the crown from the conviction (f). Perkins, in his chapter upon Dower (g), makes a *quære* if the wife shall be

(c) 1 Roll. Abr. 675. pl. 20.

(d) Co. Litt. 33. a. in notis, 14 Ed.

(e) Perk. sec. 388. Co. Litt. 31. a. (f) Co. Litt. 31. a. 1 Inst. 129.

(g) Sect. 365.

allowed dower in case the husband lies sick in his house, where he and the wife are both dwelling, and she refuses to come near him during his illness; it seems, however, that a plea of this kind would not be permitted to deprive her of this legal provision, as the offence amounts to no more than a defect in attention and duty to the husband.

Feme in a phrenzy, and while insane, kills her husband or some other person, she shall nevertheless be intitled to dower, the act not being imputable to her as a crime, or as felony, for want of understanding at the time of its perpetration (h).

By the *common* law, which differed from the *civil*, the marriage of an idiot or lunatic was considered valid, and consequently the wife intitled to dower; this rule, however, does not seem to have been adopted by more recent decisions, which have declared void the marriages of lunatics entered into during the period of lunacy (i); *à fortiori*, the marriage of *idiots* must be invalid, as they are equally incapable of entering into contracts as lunatics *pro defectu animi*. And it is provided by the statute of the 15 Geo. II. c. 30. That the marriage of lunatics and persons under phrenzies (if found lunatics

(b) Perkins, sect. 365. (i) Morrison's case *coram delegat.*

under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, shall be void.

#### Second,—OF WHAT ESTATE.

The widow is intitled to be endowed “of a third part of all lands and tenements of which her husband was legally seized in fee-simple or fee-tail at any time during the coverture, and of which any issue she might have had, might by possibility have been heir (k).”

In illustrating this proposition, I shall consider the different parts of it in the order they arise.

1. *Of a third part of lands and tenements.*—Under these words dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that favour of the reality, (i. e.) which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estovers, common appendant, or in gross (if certain), advowsons in gross, fairs, bailiwicks, profits of a park-keeper, profits of courts, tithes, woods,

(k) 2 Black. Com, 131. Litt. sect. 36, 53. Perk. sect. 301.

and the like (*l*). But if a common be *sans nombre*, (i. e.) without stint, the wife shall not be endowed; for as the heir would have one portion of the common, and the widow another, and both without stint, the common would be doubly stocked, which would be inconvenient (*m*).

It was adjudged at the period when castles were built, and holden for the protection and defence of the kingdom, that they should not be subject to dower, the law in this instance preferring the public good to a private individual claim. Also if a messuage or dwelling-house were *caput comitatus five baronie*, the widow was not intitled to dower; but this doctrine extends only to *baronies by tenure*, and not to mere *titular baronies*, created at this day (*n*).

Of a mere annuity granted to the husband and his heirs the widow shall not be endowed, because it is a personal demand only, a mere charge upon the person of the grantor, and does not issue out of any lands or tenements (*o*). But if a rent-charge be granted to the husband and his heirs, and before distress made

(*l*) 2 Black. Com. 113. Perk. sect. 342, 347. Co. Litt. 32. a.

(*m*) 2 Black. Com. 132. Co. Litt. 32. a. Perk. s. 341.

(*n*) Co. Litt. 31. b. 1 Lord Raym. 72. 3 Lev. 401. S. C.

(*o*) Co. Litt. 32. a.

he die, and then the widow brings a writ of dower against the heir, he cannot elect in *pais* to consider the rent as a mere personal annuity to defeat such claim; yet if the heir had brought a writ of annuity, and recovered judgment prior to the widow, it seems the rent-charge would have been converted into a personal annuity only, out of which the widow could have claimed no dower (p); for by recovery of judgment, in this action the lands are for ever discharged of the distress (q).

There is an exception to the generality of the above proposition relative to the seisin of the husband giving the wife a title to dower; for in the case of an *exchange*, the widow shall not be endowed both of the lands given and taken in exchange, but she may elect of which she had rather take dower (r); *similiter*, if a husband seized of a rent-charge in fee, purchase the inheritance of the lands out of which the rent issues, the widow may elect of which she will be endowed (s). Also if the husband make a feoffment in fee, reserving a rent, she may elect to be endowed either of the lands or of the rent; if of the former, she shall hold them discharged of the latter (t). But if there be lord

(p) Co. Litt. 144. b.

(q) Litt. sect. 219. (r) Co. Litt. 31. b. Perk. sect. 319.

(s) Perk. sec. 320. (t) Ibid. sect. 324.

and

and tenant by fealty and rent, and the lord marries, and then the tenancy escheats by the death of the tenant, the widow cannot elect between the seigniory and the tenancy, because the former was determined by act of law; if, however, the tenancy were recovered from her by an elder title, the seigniory would be revived either in the whole, or in part, for the widow's benefit. And note the difference between the act of law and the act of the party; for if the seigniory had been extinguished by the act of the husband, as by his purchase of the tenancy, the widow would have had a right to elect (u).

The period for the wife to make election is at the husband's death, and not sooner; accordingly, if husband and wife exchange the lands of the wife for others, and then they convey away by deed and fine the lands taken in exchange, the widow will not be bound by the exchange, but may enter upon her estate (x).

The widow by the general law of copyholds is not intitled to dower, or to speak more properly to *free-bench*, in lands holden by customary tenure, so that her right to free-bench (if she claim any) must be grounded on a *special* custom (y); and although the widow is usually in-

(u) *Perk.* sec. 320, 321. *Bro. Abr.* 44. b.

(x) *Leon.* 285. (y) *Gilb. Ten.* 202. 4 *Rep.* 22. a.

titled to no more than a third part of her husband's freehold estate as dower, yet a custom that she may have a moiety, or three parts out of four, or the whole, or even a less than a third, will be valid (z). Thus by the custom of *gavelkind*, the widow is intitled to a moiety so long as she continues chaste and unmarried, which custom she cannot waive and resort to her third at common law, *confuetudo enim tollit communem legem* (a).

2. *Of which the husband was seized in fee-simple or fee-tail at any time during the coverture.*

Of a *trust* (b), therefore, the widow cannot be endowed, for the law requiring a *legal* seisin in the husband to intitle the wife to dower, a mere *equitable* seisin in him will not be sufficient for the purpose, a trust being synonymous to a *use* at common law, of which the widow was not dowable (c).

On the same principle, if the husband's estate be subject to a mortgage in *fee*, during the whole period of the coverture, the widow will be barred of dower (d). But in cases where the husband's

(z) Co. Litt. 33. b. Fitzh. Nat. Brev. 150. Cro. Eliz. 415.

Dyer, 192.

(a) Robins. Gavelk. 159. 179. Cro. Eliz. 121, 825. Leon 62.

(b) Pre. Ch. 336. Forrest. 138.

(c) Perk. sect. 349. 4 Rep. 1. b. (d) 1 Bro. C. C. 328.

estate is subject to a term for years only, the law admits of several shades of distinction relative to the widow's title to dower. Thus at law, if the husband let his lands before marriage for a term of years, the widow will be intitled to dower of the reversion, with a stay of execution during the term, for the husband was seized of the inheritance during the marriage, and if a rent be reserved upon such grant, the widow will be intitled to a third part of it (e); but if the husband demise to another for *life previous* to the *coverture*, with or without rent, and die before the lessee, the widow will not be intitled to dower either of the reversion or of the rent; not of the reversion, because the husband had no legal seisin during the marriage; nor of the rent, because it did not issue out of an estate of inheritance (f). But if lessee for life demise to the lessor and his heirs, or the heirs of his body, for the lessee's life, and afterwards the lessor die, living the lessee, the widow of the lessor shall have dower, because the demise to him by the lessee amounted to a surrender of his the lessee's life-estate, and let in the reversion, so that the lessor became seized of the inheritance during the *coverture* (g).—Again,

(e) Co. Litt. 32. a. 1 Roll. Abr. 678. pl. 20.

(f) Co. Litt. 32. a. Perk. sect. 348.

(g) Roll. Abr. 677. pl. 25.

If the husband's estate be subject to a mortgage secured by a term of years, the widow will be intitled to dower as against the heir or devisee of the husband, on keeping down a third part of the interest, or on paying a third of the principal; but with respect to the mortgagee the widow must necessarily discharge the *whole* of the debt, and on that event she will be intitled to hold the estate until satisfaction made of what she has overpaid.

If a term be satisfied and out-standing, the widow will be intitled to dower *immediately* against the heir or devisee (*h*); *contrà* against a purchaser of the estate for a valuable consideration; and upon this reasoning, that dower being considered the widow's sole provision for herself and children, is favoured in law, and will therefore prevail against the claims of heirs and mere volunteers; but this inclination of law will not extend to injure the just rights of *bona fide* purchasers, whose claims are at least equal in justice to those of widows in respect of dower; therefore the assignment of a satisfied outstanding term in trust to attend the inheritance for the benefit of a purchaser, will postpone the wife's dower during the continuance of it, so

(*b*) Pre. Ch. 133. 241. 1 P. Will. 137.

that

that if a number of years remain unexpired, the widow will be totally barred of dower (i).

*A.*, tenant in tail *general*, makes a feoffment in fee, and retakes an estate to himself and wife in *special* tail, the wife dies, *A.* marries again, has issue and dies, the second wife shall not be endowed notwithstanding the issue is remitted to the *general* tail, because the husband was seized of the estate in *special* tail only during the coverture between him and his second wife (k).

However, the law does not require an *actual* seisin in the husband, (i. e.) possession of the lands, to give the widow a title to dower, a seisin *in law* is sufficient (l); for the wife is supposed not to have the power of compelling her husband to obtain possession of the premises; therefore a *mere descent* of lands of inheritance upon him during the marriage, will intitle the wife to dower, an entry by the husband not being necessary (m).

And note the difference between a right of entry necessary only to complete a title *in law* in the husband, and a mere right of entry re-

(i) Show. Parl. Ca. 69. 2 Atk. 208. Pre. Ch. 98.

(k) Perk. sect. 302. Co. Litt. 31. b.

(l) Perk. sect. 304, 371, 372.

(m) Co. Litt. 31. a. Gilb. Dow. 391.

maining in him during the coverture; for if a man be *disseised before* marriage, and then take a wife, but dies before entry, his widow will not be intitled to dower, for he was not feized of the inheritance either in deed or in law during the coverture (*n*). The law is the same in cases of abatements, non-entry for conditions broken, non-entry by the husband on lands taken by him in exchange, and non-entry upon, or execution not sued of, lands recovered by judgment at law (*o*). And it is said to have been determined, that if a man bargain and sell his lands to another and his heirs by deed indented and inrolled subject to a condition, and the bargainer afterwards marries, and then the condition is broken, the husband dies *before entry*, the widow shall not be endowed; for although the use revested in the husband without entry by the statute of usages (*p*), yet by the same act the use is transferred to, and incorporated with, the land, so that in truth the husband had no feifin of the estate before entry (*q*).

If a rent be granted to the husband, and he die before the first day of payment arrive, the widow may claim dower, and the law is the same,

(*n*) *Perk. sect. 366.*

(*o*) *Ibid. sect. 367, 368, 369, 370.* (*p*) *27 Hen. 8. c. 10.*

(*q*) *6 Rep. 34. a.*

although

although he had survived that period, and refused to accept the rent from the tenant (r).

If the custom of a manor allow the widow free-bench of copyhold estates, she will be entitled to that provision, although her husband neglect to be *admitted* tenant (s). This difference must be noticed, indeed, between dower and free-bench; (i. e.) the latter does not like the former attach upon *all* the copyhold lands the husband was seized of during the marriage, but upon such only of which he *died seized* (t).

Seisin for a mere *instant* of an estate in which the husband claims no beneficial interest, but is a mere instrument, will not intitle the widow to dower. The conusee of a fine renders back again the lands to the conusor, the widow of the conusee cannot claim dower upon such a transient seisin in her husband; and for the same reason, if the husband tenant for life, or joint-tenant, make a feoffment in fee, the temporary fee he acquired in the first case, and the instantaneous separate freehold he procured by the feoffment in the second, will not intitle the widow to dower (u).

(r) Perk. sect. 373.

(s) Gilb. Ten. 287.

(t) 2 Atk. 526.

(u) Co. Litt. 31. b. Cro. Jac. 615. Vaugh. 41. 1 Roll. Abr. 676.

pl. 45.

As

As the widow's title to dower is totally dependent upon and arises out of the seisin of the husband, it necessarily follows, that if such seisin be defeated or evicted by an elder title, her right to dower must fall with it. Thus if there be grandfather, father, and son, and the grandfather being seized of three acres of land in fee, marries and dies, upon which the lands descend to the father, who also dies leaving a widow intitled to dower, and the son enters and endows his grandmother of one acre, who soon after dying, the father's widow claims a right to endowment of the same acre; but such claim is not allowable, because the father's seisin, *quoad* this acre, was defeated in *toto* by the grandmother's endowment, so that he was in truth seized of no other estate during the coverture than of a reversion in fee, depending upon an estate for life, viz. the estate for life of the grandmother: but if the grandfather had *enfeoffed* the father of this acre during the marriage of the latter, and afterwards the grandmother had been endowed of it, the widow of the father might notwithstanding claim dower of this acre after the grandmother's death, because the father's seisin could not be defeated by the endowment of the grandmother as in the last case, since the completion of the father's seisin was *prior* to the grandmother's, viz. that of the former, from the period of the feoffment, and the con-

summation of the title of the latter from the grandfather's death à *relatione* (x).

In the case first proposed of grandfather, father, and son, the time of endowment may vary the determination of law: thus if the father's widow be endowed by the son *before* the grandmother, and then the latter recovers the acre against the widow, the widow may claim the acre *after* the grandmother's death for dower; because by the endowment, the widow became intitled to an estate for her own life in the acre, which, in the eye of the law, is greater in relation to the widow than the estate for life of the grandmother; so that by recovery of the acre by the latter as dower, a reversion or remainder was left in the widow expectant upon the decease of the grandmother (y).—Again,

If there be father and son, and the father being seized in fee-simple of one acre of land, give it in exchange to a stranger for another acre, the father dies, and the son marries and enters upon the acre taken in exchange, the stranger is evicted, and thereupon enters upon the acre given by him in exchange to the father, the widow of the son shall not be endowed of the last acre, because the seisin of the son was

(x) Co. Litt. 31. a. and b. Perk. sect. 315.

(y) Co. Litt. 31. b. Perk. sect. 316.

entirely

entirely defeated upon the eviction and entry of the stranger, in consequence of the implied condition annexed to all exchanges, that if either party be evicted of the thing received in exchange, through defect of the others title, he shall return to the possession of his own, and this has relation to the period of making the exchange (z).

Two coparceners make partition of their estate, and one marries, the other is impleaded of his part and vouches his companion, the vouchee enters into warranty, and the demandant recovers; a moiety of the part assigned to the vouchee at the time of partition is given by him to the evicted coparcener, and then the vouchee dies, his widow will not be intitled to dower in the whole share allotted to her husband upon the partition, but in a moiety only; because the title of the surviving coparcener to the part given him *pro rata*, will have relation to the death of the common ancestor, and consequently defeat the seisin of the vouchee *pro tanto* (a).

Upon the same principle, if feoffee upon condition marry, and the feoffor enters for a breach, and then the feoffee dies, his widow will not be intitled to dower, for the entry of the feoffor

(z) *Perk. sect. 309.*

(a) *Co. Litt. 174. a. Perk. sect. 310.*

defeated the seisin of the feoffee *in toto*, and all rights appendant or incident to it (b).

We must distinguish, however, between the defeazance of the husband's seisin by a title paramount and prior to the commencement of it, and an event which, not affecting the husband's seisin, determines his interest in the estate; for if donee in tail marry and die without issue, by which event the estate is determined, and then the donor enters, yet the estate tail will be considered as having continuance *quodd* the widow to intitle her to dower (c). And if a rent be reserved upon such a gift in tail, which expires by failure of issue of the donee, as the widow of the *donee* will be intitled to dower of the lands in tail, so she will be attendant on the heir of the donor in respect of the rent after endowment, although it became extinct upon the death of the tenant in tail without issue (d). And if a person make a gift in tail, reserving a rent to himself and heirs, and then marries and dies, and afterwards the tenant in tail dies without issue, the *donor's* widow will not be intitled to dower of this rent, because it was extinct upon the death of tenant

(b) Co. Litt. 201, 202. Perk. sect. 311, 312.

(c) 8 Rep. 34. Perk. sect. 317. F. N. B. 149.

(d) Co. Litt. 241. a. Bro. Abr. 44. Perk. sect. 431.

in tail without issue (e). And the construction of law would be the same, if the estate-tail had been defeated by the entry of the donor's heir for breach of a condition annexed to the donee's estate, for by such entry, the estate-tail, out of which the rent issued, is determined, and the rent extinguished.

If the *freehold* of rents, commons, &c. be suspended before the *coverture*, and continue so until the husband's death, the widow will not be intitled to dower (f).

To effect this, however, the freehold must be actually suspended; for if tenant in tail *covenant* to stand seized to the use of *himself for life*, remainder to the use of his eldest son in tail, and afterwards marries, his widow will be intitled to dower, because there was no alteration effected in the husband's estate by the covenant, or any suspension of the freehold during the *coverture*; but he continued seized of the estate-tail, for the deed of covenant operated only upon the *estate for life* of the tenant in tail, and was a mere nullity in regard to the remainder in tail intended to be given to the son (g).

(e) *Gilb. Dow.* 394.

(f) *Co. Litt.* 32. a.

(g) *Cro. Eliz.* 279. *Yelv.* 51.

It is a general rule that the dowress shall be attendant upon the reversioner for a third part of the services by which he holds over; therefore, if the heir hold the lands by twelvepence rent, the widow will be answerable to the heir for fourpence of it (*h*); but if the service be entire, and the value not ascertained, as of a horse yearly, she will be attendant upon the heir by rendering to him a horse every third year, and not by paying to him the third part of the value of a horse annually (*i*).

The eviction of the husband in order to defeat the wife's right to dower, must be in consequence of a *real* title; for if the recovery of the defendant be *colourable* only, that is for the express purpose of barring dower, as upon an acknowledgment by the husband without right in the defendant, or by default of the husband without shewing a title in the recoveror, the widow may in such cases claim dower with effect (*k*). Pursuant to this distinction, if a man be disseised, and the disseisor die after being in peaceable possession for five years (*l*), and then the disseisee enters upon the heir and marries, after which the heir of the disseisor recovers pos-

(*h*) *Perk. sect. 424, 425. 9 Rep. 135.*

(*i*) *Perk. sect. 434.*

(*k*) *2 Inst. 349. Perk. sect. 376, 377, 378. Stat. Westm. 2 cap. 4.*

(*l*) *32 Hen. 8. cap. 33.*

seffion of the lands in a writ of entry, in the nature of an assize by the *default* or *reddition* of the diffeifee, the widow of the latter will not be intitled to dower against the heir of the diffeisor, because he had *right* to the possession of the lands when he recovered them. But if the diffeisin had been committed *after* marriage, the widow might have claimed dower, for her husband was seized of a lawful estate of inheritance during the coverture, to which dower was incident, and which could not be defeated by the subsequent events (m).

If the widow be evicted by a title paramount, she will be intitled to be re-endowed of the third part of her husband's real estate. Accordingly, if the husband be seized of three acres of land, and his widow is endowed of one, which is recovered from her by a prior title, she shall be endowed of a third of the remaining two acres, and not of so much as is equal to the value of the acre taken from her; because after recovery the husband's feisin in the acre was defeated *in toto*, and was the same as if he had never been seized of it (n).

If the husband during the coverture convey away incumber, or extinguish the estate or here-

(m) *Perk. sect. 379, 380. 1 Roll. Abr. 681.*

(n) *1 Roll. Abr. 684. pl. 30. Perk. sect. 449.*

tadiment in which the widow is intitled to dower, or if he even pledge them for a debt due to the king (o) and contracted during the marriage, these acts will not be permitted to defeat her legal right; but she may claim dower in the same manner as if they had never taken place (p). Yet if the lord of a manor make voluntary grants of *copyhold* lands *after* marriage, they will bind the widow and deprive her of dower, because the copyholders claim by the custom, which is antecedent to her right to free-bench (q); to which may be added, that as the husband did not die seized of those lands granted by copy, the widow's title to free-bench was never complete (r). But if the *customary heir* grant copies *before* he assign dower, the widow may avoid them; because her title to free-bench was consummate by the husband's death (s). *Similiter*, if the husband copyholder dispose of his lands during the marriage, it will deprive the widow of free-bench, unless there be a particular custom that she may avoid the alienation, for the husband was not *seized* of the copyhold lands *at the time of his death* (t). The wife, therefore, has not in those cases any *initiate*

(o) Co. Litt. 31. a. F. N. B. 150. Gilb. Dower, 407, 408, 409,

411. (p) Co. Litt. 32. a. 7 Rep. 38. 4 Rep. 64, 66;

(q) Gilb. Ten. 202.

(r) 2 Atk. 526.

(s) Gilb. Ten. 202.

(t) Gilb. Ten. 321. Carth. 276. 2 Term. Rep. K. B. 580,

title to dower by the marriage as at common law, but a *conditional inception of title* only, subject to the husband's power of prevention by alienation.

The law is also the same if the copyhold be *extinguished* by the feoffment of the lord to the husband (*u*); but the copyhold tenure must be unquestionably destroyed; for if the husband copyholder for life of lands, in which the widow is intitled to free-bench, purchase the freehold and inheritance, and take a conveyance of it to a trustee for himself, so that the union of the two interests is prevented, the widow may claim her provision by the custom (*x*).

If the husband intitled to the inheritance of copyhold lands, surrender them to a purchaser or a mortgagee in fee, and dies *before* the admittance of the surrenderee, the widow's title to free-bench (as it seems) would be barred by the surrender; for it is obvious, that the husband did not die seized of the lands, and the admittance of the surrenderee (although after the husband's death) will have relation to the surrender, so as to defeat the widow's claim to her customary estate (*y*).

(*u*) Cro. Jac. 126.

(*x*) Cro. Jac. 573.

(*y*) 3 Lev. 385. Cro. Jac. 573. Cro. Car. 569.

Husband, pursuant to the custom, leases his copyhold lands, in which the widow is intitled to free-bench, for a term of years, the demise is good against the widow's right, for the lessee's title by the custom is equal to that of the widow; *contra*, if there be a *special* custom enabling her to defeat the husband's act, and Chief Baron Gilbert was of opinion, that if a rent were reserved upon such a lease, the widow would not be intitled to endowment of the rent and reversion, because particular customs are to be strictly pursued, and the custom intitled the widow to free-bench of the *land* only; but that after the expiration of the lease she might claim free-bench, for her husband in fact died seized, the possession of the lessee being considered the possession of the husband (a).

Customs, that if a copyhold tenant marry a *widow* she shall not have dower, or that if the husband sell the estate, and the wife receive part of the purchase-money, she shall be barred of dower, are said to be good customs (b); but a custom that the widow shall not be endowed of the husband's estates of inheritance is void, as militating against the law of the land (c).

(a) Gilb. Ten. 320, 321. Perk. sect. 435, 436. Cowp. 481.

(b) Roll. Abr. 562. pl. 45, 50. (c) Ibid. 563.

If a person seized of an estate-tail make a defeazable conveyance in fee to the husband, and the husband dies, the widow will be intitled to dower against the heir of the husband, subject however to eviction by the issue in tail; the rule is the same if the subject disposed of by the tenant in tail were *in grant* only, as a rent, common, &c. (d), the reason is, that the husband is considered as seized of an estate of inheritance, until the issue in tail shew the contrary by disproving his title *et sic de similibus* (e).

If lands be given to husband and wife in special-tail, with remainder to the right heirs of the husband, and the wife dies without issue, and the husband marries again and dies, his widow shall be endowed; and for this reason, the husband upon the death of his first wife became *tenant in tail after possibility of issue extinct*, which estate meeting with the remainder in fee in the husband merged in it, by which means the husband was seized of the inheritance during the coverture, and the widow consequently intitled to dower (f).

It is said that if A. seized of lands in fee, covenant to stand seized to the use of himself and

(d) 10 Rep. 96, 98.

(e) Roll. Abr. 677. pl. 30. Perk. sect. 420.

(f) Perk. l. 338. Roll. Abr. 677. pl. 10.

his heirs until *C.* his middle son take a wife, and afterwards to the use of *C.* and his heirs; and *A.* dies, and the lands descend to *B.* his heir, who also dies, and then *C.* marries; the widow of *B.* shall not have dower, because the estate of *B.* determined by express limitation made before her title of dower commenced; and, therefore, her dower which was derived out of it could not continue longer than the original estate. The very case came before the court *Tr. 8. Car. Rot.* 1343, but no judgment was given, the court being equally divided in opinion. It seems, however, to be the better opinion, that the widow of *B.* would be intitled to dower, for it is unquestionably the *seisin* of the husband that gives a title to dower, and if that title once attach, the claim of the widow is so much favoured by law, that even the natural determination of the estate, in respect of which the wife was dowable, will not be permitted to defeat such claim; this being the fact, it should seem there is no difference with regard to the wife's title to dower, whether the estate in respect of which she is dowable be made to expire upon an event that must happen or not within a given period, as upon the marriage of *C.*, or at an indefinite period, viz. the death of the husband without issue; the law being settled, as appears before, that in the latter case her right to endowment still continues, although the interest or estate in respect of which she was intitled

titled to dower determines. The case is obviously different when the seisin of the husband is *defeated* by a title or conditional gift *prior* to the marriage; for in those instances, upon eviction or entry for breach of the conditions, the husband is considered as never having been seized at all, whereas in the instance when his estate is made to determine at a precise period, the *intermediate* seisin of the husband remains unaffected upon arrival of the time prescribed for the expiration of his interest in the estate. The above observations appear to be supported by the judgment of the Court of King's Bench in a late case of *Buckworth v. Thirkell* (g).

If lands be given to the husband for life, remainder to *A.* in tail, remainder to the husband in fee, and the husband die, living *A.*, the widow will not be dowable, for her husband was intitled to an estate of inheritance only expectant upon an estate-tail in *A.*, which is a seisin insufficient to create dower (h); but the law would have been different if *A.* had died without issue before the husband (i).

Upon the same principle it seems, that if the estate of the husband be depending upon a contingent remainder in tail which never vests, the

(g) Tr. Term. 25 Geo. 3. See also 1 Leon. 168.

(h) Roll. Abr. 677. pl. 15. Perk. 335. (i) Perk. sect. 337.

widow shall have dower, because the husband was seized of the inheritance during the coverture, subject only to be defeated by the vesting of the tenancy in tail, which never happened; and if such remainder in tail had been destroyed by descent of the inheritance upon the *particular* tenant, his widow would be intitled to dower. Thus if lands were given to *A.* and wife for their lives, remainder to *B.* their son for life, remainder to *his first and other sons in tail*, remainder to *A.* in fee, and *A.* and wife die, living *B.*, who afterwards dies, leaving a widow, she will be intitled to dower; for *B.* was seized of the inheritance during the marriage, which merged his estate for life, and destroyed the contingent remainder to *his first and other sons in tail* (*k*).

If a gift be made to the husband for life, remainder to *B.* and his heirs during the husband's life, remainder to the heirs male of the body of the husband, his widow will not be intitled to dower of this estate, for the remainder in tail in favour of the husband was not *executed* in him during the coverture from the intervention of the interest limited to *B.* (*l*).

(*k*) Rep. Temp. Hardw. 13. Fearne Cont. Rem. 265, 271. and note the distinctions and reasonings in the book last referred to.

(*l*) 3 Lev. 437. Rep. Temp. Hardw. 13. 18 Vin. Abr. 415.

If the estate intermediate the inheritance in the husband be for a *term of years* only, it will not prevent dower, because such an interest does not prevent the present seisin of the husband of the fee-simple in the estate, the possession of the grantee of the term being considered the possession of the owner of the freehold (m).

Of an estate holden in *joint-tenancy* the widow, will not be intitled to dower, and for this reason, the surviving joint-tenant claims paramount the widow's title, viz. by survivorship under the original conveyance; therefore if lands be given to two men and their heirs, or to the heirs of their two bodies, and one dies in the life-time of his companion, leaving a widow, she will not be intitled to dower; for her right to dower is defeated by the *jus accresendi* of the surviving joint-tenant (n).

But the widows of *tenants in common* may claim dower, for tenants in common have several inheritances, which descend to their respective heirs, so that dower necessarily arises out of the seisin of the husband (o). And if lands be given to the husband and wife and to the heirs

(m) Lord. Raym, 326. Perk. sect. 336. 1 Salk. 254.

Lutw. 729, 733.

(n) Co. Litt. 30. a. 37. b. Perk. 334.

(o) Co. Litt. 34. b. 37. a. 3 Lev. 84.

of the husband, the wife will be intitled to dower, if she dissent to her estate for life after the husband's death, and then the husband will be considered as sole seized of the freehold and inheritance *ab initio* (p).

3. *Of which any issue the widow might have had, might by possibility have been heir.*

Therefore if a man seized in fee-simple have a son by his first wife, and afterwards marry a second, she shall be endowed of his lands, for her issue might by possibility have been heir on the death of the son by the first wife. But if there be a donee in *special* tail holding lands to him and the heirs of his body begotten on *Jane* his wife, although *Jane* may be endowed of these lands, yet if she die, and he marry another wife, the second wife cannot be endowed of the lands intailed, for no issue that she could have, could by any possibility inherit them *per formam doni* (q).

THIRD—In what manner.

At common law, as confirmed by *Magnâ Cartâ* (r), the widow is intitled to remain in the hus-

(s) *Perk.* sect. 352, 353. 3 *Rep.* 27. b.

(q) 2 *Blackst. Com.* 131. *Litt. sect.* 53. 8 *Rep.* 36. a. *Cro. Jac.* 615. (r) *Cap. 7.*

band's capital or principal messuage or dwelling-house, of which she is dowable, forty days after his death, and to be supported *de bonis viri* (s). This is called the widow's *quarentine*. But if she marry during those days, her right to quarantine determines; for in that case the widow has provided for herself, which suspends the immediate provision the law made for her. In pleading quarantine, the widow must shew in certain the time when the husband died and the forty days after (t); and if she be evicted by the heir or ter-tenant, she is intitled to a writ *de quarentinâ habendâ* (u).

The particular lands to be held in dower must be assigned, or set out by the heir of the husband, not only for the sake of notoriety, but also to intitle the lord of the fee to demand his services of the heir in respect of the lands so holden, for the heir by his entry becomes tenant to the lord, and the widow is immediate tenant to the heir by a kind of subinfeudation, which is completed by the assignment (x).

Assignment of dower by a mere ter-tenant will bind the heir, and it makes no difference whe-

(s) 2 Inst. 17. 3 Lev. 401. 5 Mod. 65. 1 Salk. 253. Co. Litt. 32. b. (t) Dyer, 76. pl. 32.

(u) Co. Litt. 34. b. F. N. B. 161. Gilb. Dower, 372.

(x) 2 Black. Com. 135. 6. Perk. sect. 393. Gilb. Dower, 356,

ther he acquired the possession by right or by wrong, provided there be no fraud or collusion between him and the widow, and the assignment be of such estate as she is intitled to for dower. Therefore, if an *abator*, *diffeisor*, or *intruder*, assign dower, it will be valid against the person having right to the lands, because assignment of dower is a legal obligation upon the tenant, which he is obliged to perform without delay (*y*). But if an abator, &c. assign to the widow for dower a rent out of such lands, instead of a third part of the lands themselves, the assignment is void, because the widow was not intitled to such an endowment, and consequently the abator, &c. not obliged by law to make such assignment (*z*).

However, the widow will not be permitted to take advantage of a diffeisin to which she was a party; accordingly if the widow diffeise the tenant of the lands in which she is intitled to dower, and is afterwards endowed of the same by a person claiming under her, the endowment will be void against the diffeisee (*a*).

Assignment of dower by one of several joint-tenants to the widow of the person under whom they derive their estate will bind the others of

(*y*) Co. Litt. 35. a. Perk. sec. 394, 395.

(*z*) Co. Litt. 35. a. Perk. sect. 398. (*a*) Perk. sect. 396.

them, if the widow be intitled to endowment of the thing assigned (b). And the law is the same if the widow were endowed by one of several feoffees of the husband claiming under distinct feoffments; and yet it is said that the feoffees *inter se*, cannot take the benefit of the assignment, being strangers to it, though indeed Mr. Perkins states the law to be otherwise (c); it seems, however, agreed, that if the husband die seized of other lands in fee-simple, and the heir endows the widow of them in satisfaction of dower out of his own estate and the lands of the feoffees, the latter may take advantage of the assignment, and if impleaded, may vouch the heir who will be admitted to plead the assignment, lest the feoffees should recover in value against him (d).

Dower cannot be assigned by any person who has not a freehold in his own or in another's right, or against whom a writ of dower does not lie, because the possession of a less estate is insufficient to answer the widow's demand. Thus it is said, that a guardian in *focage* cannot assign dower, as a writ of dower does not lie against him (e); however, tenant by statute merchant, statute staple, or elegit, or lessee for years, cannot af-

(b) Perk. sec. 397. (c) Sec. 402.

(d) Co. Litt. 35. 9 Rep. 18. Perk. sec. 400.

(e) Co. Litt. 35. a. Perk. sec. 404.

sign dower (*f*). But a man seized of lands in right of his wife, or jointly with her, in which another woman is dowable, may alone assign the latter dower (*g*).

The assignment of dower must be certain, and in general set out by *metes and bounds* by the heir, ter-tenant, or sheriff. This species of endowment is most beneficial to the widow; for it has been adjudged, that if she accept an assignment of dower against common right, she will be liable to incumbrances charged upon the lands by the husband during the coverture (*h*). Thus if the heir assign, and the widow accept, one of three acres as dower, which acre is subject to a rent granted by the husband during the marriage, the assignment will be good and binding, notwithstanding the widow was intitled to have a third part of each acre set out by metes and bounds (*i*): however, as she waived her common law right, and accepted a different endowment, the acre assigned to her will be charged with the rent (*k*); and if in this case the rent had been granted out of the three acres, two

(*f*) Co. Litt. 35. a. Perk. sec. 404.

(*g*) Roll. Abr. 681. pl. 50. Perk. sec. 399.

(*h*) Co. Litt. 32. b. 34. b. 19 Edw. III. 154.

(*i*) Roll. Abr. 683. pl. 30. Perk. sec. 405, 406.

(*k*) 5 Edw. II. Avowry, 206. Roll. Abr. 684. pl. 50.

parts of the widow's acre would have been subject to the distress of the grantee (l).

If the subject of dower be divisible, and the sheriff does not return seisin by metes and bounds, such return is void, unless sufficient certainty can be collected from it of what was assigned, or unless he assign one manor which is certain in lieu of dower in other manors, which he may do (m). But if the sheriff abuse the trust reposed in him *virtute officii*, and convert it into an engine of fraud and oppression, by making an illusory or a malicious assignment, or by refusing to make a proper division by metes and bounds, the court will commit him to prison (n).

It sometimes happens, that from the nature or quality of the estate of which the widow is dowerable, her third part cannot be assigned by metes and bounds, in those instances *impotentia excusat legem*; accordingly, if one of two joint-tenants alien his part in fee-simple, and the alienee marry and die, the widow is intitled to assignment of a third of the moiety purchased by her husband for dower, to hold in common with the husband's heir and the other joint-

(l) Perk. sec. 330, 331.

(m) Co. Litt. 34. Perk. sec. 414. Roll. Abr. 683. Perk. sec. 332.

(n) Palm. 265. Keb. 743.

tenant, but in this case dower is not assigned by metes and bounds (o).

Of a mill the widow shall not be endowed by metes and bounds, nor in common with the heir, but of the third toll-dish; or she may have a third part of the profits (though uncertain) (p). *Similiter*, the widow shall be endowed of a third part of the profits of stallage, of a fair, of an office, of the keeping of a park, of a dove-house, of a piscary, of courts, and of the third sheaf of the tithe of corn, &c. (q). But in all these cases assignment must be made (though not by metes and bounds) before the widow will be permitted to receive her third part or proportion, for the law does not allow the same person to elect and to divide (r).

The assignment must be of part or parcel of the land of which the widow was dowable, or of a rent, or some other profit issuing out of the same, as of so many bushels of wheat annually (s); whence it follows, that assignment of leasehold lands in satisfaction of dower, or of a rent granted out of such lands, is not a good legal

(o) Litt. sec. 44. Perk. sec. 412.

(p) Co. Litt. 32. a. Perk. sec. 415.

(q) Co. Litt. 32. a. Brownl. 126. Gilb. Dower. 371.

(r) Roll. Abr. 681. Dyer, 343. Co. Litt. 34. b. Perk. sec. 416.

(s) Co. Litt. 34 b. Moor. 59. Dyer, 91. in marg.

assignment,

assignment, and therefore is no bar to the widow's demand of dower at law (*t*). If, indeed, the grant of the rent be by indenture which operates by *estoppel*, it seems that the widow will be bound by the grant and assignment (*u*). And a rent granted to the widow by the heir out of the husband's principal mesuage or dwelling-house of which she was dowable, in lieu of dower, is a good assignment (*x*).

The assignment must be *absolute*; therefore if the heir assign a rent to the widow in satisfaction of dower, and annex a condition to the grant, or if he assign lands and make an exception or reservation of the trees, &c. either the condition and exception or reservation are void, so as to leave the grant and assignment valid, or the grant and assignment are void *in toto*, and the widow may recover her dower at law (*y*).

If the heir after the husband's death, and before assignment of dower, improve the lands, the widow will be intitled to a third of the value of such improvements, because her right to endowment was complete at the husband's death,

(*t*) Co. Litt. 34. b. Perk. sec. 406.

(*u*) Dy. 91. pl. 12. (*x*) Perk. sec. 406.

(*y*) Roll. Abr. 682. Plowd. 25. b. Co. Litt. 34. b. Cro. Eliz. 451. Hob. 153.

and the improvements, as to her part, were *quasi* upon her land; and upon the principle of equal justice, if the estate decrease in value in the time of the heir, she must partake of the loss, and can only claim dower according to the value at the period of the assignment, unless such diminution was occasioned by the voluntary act of the heir, and then she will be intitled to damages against him (z).

If the feoffee of the husband improve the lands by building, &c. the widow of the feoffor can claim dower only according to the value of the estate at the time of the feoffment, for the heir is not bound to render more upon the warranty than the value of the estate at that period; so that if the widow was intitled to endowment of the improved value, she would recover more against the feoffee than he could do upon the warranty against the heir, which would be unreasonable (a); therefore, assignment of dower by the feoffee, according to the value of the lands at the time of the feoffment, will be good and binding upon the widow.

It is said by Perkins, concluding indeed with a quære (b), that if the husband or his feoffee pull down buildings, &c. the widow will

(z) Co. Litt. 32. a. 2 Inst. 81.

(a) Co. Litt. 32. a. Perk. sec. 328.

(b) Sec. 329.

be intitled to dower according to the value only of the estate at the period of her husband's death, because her right to endowment was not consummate before that time. This, however, appears to be a very harsh doctrine for the widow, if the law be so, but which I think questionable; for it is clear that the consummation of the widow's title to dower by the death of her husband, has in other instances relation to every period of the marriage, to defeat the charges and incumbrances made by the husband alone during the continuance of it; it seems, therefore, but reasonable that this relation should be extended to cases where the husband or his feoffee wantonly pull down houses, &c. upon the land subject to dower, and by so doing destroy the very thing *pro tanto*, of which the widow ought to have been in part endowed.

If the heir, while a minor, assign to the widow more lands for dower than she is intitled to, the heir on attaining twenty-one, or in case of his death before that age, then his heir, on arriving at twenty-one, may have a writ of *admeasurement* of dower at common law, to rectify the mistake, which also lies upon an erroneous assignment made in Chancery (c). But as this writ is applicable only to cases where the widow

(c) Co. Litt. 39. a. F. N. B. 148. Finch L. 314. Gilb.  
Dower, 379, 387.

has received more in *quantity* than she ought to have done, if the widow after assignment improve the lands allotted her for dower so as to render them of greater annual value than the remaining two parts, or if they were of more value at the time of assignment from open mines which she is at liberty to work, the writ of admeasurement does not lie for the heir, for the reason above-mentioned (d). And if the heir, being of full age, assign too much land to the widow for dower, and dies, his heir shall not have a writ of admeasurement, because he is bound by the acts of his ancestors (e).

Infant-heir assigns too large a portion of lands for dower, the assignment cannot be defeated by *entry* after he attains twenty-one; for the widow being intitled to dower, the assignment is good in part, and can be avoided only *quoad* the surplus, which cannot be ascertained before admeasurement (f).

If the widow bring a writ of dower, and dower is set out under the direction of the court, the heir shall not have *admeasurement* when he attains twenty-one; for being an infant, it is presumed that the court would take care of his

(d) 2 Inst. 368. F. N. B. 149. 5 Rep. 12. Gilb. Dow. 390.

(e) Gilb. Dow. 387.

(f) Gilb. Dower, 389.

interest; but it should seem that in such case, if the sheriff assigned more than a third part of the lands for dower, when the widow was intitled to no more, the heir might bring a *scire facias*, or he would be without remedy (g).

#### FOURTH—The remedy for dower.

At common law, if the widow were deforced of dower by the heir, she was intitled, according to the nature of her case, either to a writ of dower *unde nihil habet*, or to a writ of *right of dower* (h). The first was applicable when she was deforced of dower *in toto*; the second, when of part only, though, indeed, the latter writ might be brought either for a total or a partial deforcement. And by the statute of Westminster 1. cap. 49. it is provided, that the writ *unde nihil habet* shall not abate by plea of part endowment, unless such endowment was made by the party to the writ.

The tenant was allowed by the common law to retain the profits of the lands intermediate the recovery against him in possessory actions, and his entry into possession, to enable him to perform the feudal services, so that in all those actions (except *novel disseisin*) no damages were

(g) Gilb. Dower, 389.

(h) F. N. B. 147. Gilb. Dower, 357, 367, 370, 374.

recoverable by the demandants: this rule being found inconvenient in process of time, when the actual performance of the feudal duties began to be discontinued, several statutes were made giving costs and damages in many possessory actions (*i*); on which occasion it was provided by the statute of Merton (*k*), that widows deforced of dower in lands, whereof their husbands *died seized*, and unable to recover the same without plea, shall upon such recovery be intitled to damages against the deforceor, viz. the value of their dower from the death of their husbands *usque judicium*. Upon this statute we may make the following remarks.

It is uncertain whether it extended to a writ of *right* of dower, or to the writ of dower *unde nihil habet* only; for no damages were recovered in writs of right, because if the right was doubtful, no injury could arise to either party, until the right was firmly and clearly ascertained (*l*).

The husband must *die seized* of the freehold and inheritance; and, although the lands be subject to a term for years created by the husband before marriage, with a rent reserved, the widow will be intitled to recover a third part

(*i*) Marl. 52. Hen. III. cap. 16. Gloc. 6. Edw. I. cap. 1.

(*k*) 20 Hen. III. cap. 1.

(*l*) Co. Litt. 33. a.

of the reversion, and also a like proportion of the rent and damages, for the husband died seized of the freehold (m). But if the husband make a feoffment to the use of himself for life, remainder to his son in tail, and dies seized, his widow shall not have damages, because he was not seized of the inheritance at the time of his death; accordingly, the mere finding of the jury that the husband died seized, without saying of what estate, is error; and note, that the damages in dower are first, the value *de tempore mortis viri*; and secondly, *damna occasione detensionis dotis* (n).

It is said by Lord Coke, that if the widow do not shortly after her husband's death apply for dower against him without a previous request to assign dower, he may plead *tout temps pris*, which plea (if established) will excuse him from rendering to her damages for non-assignment of dower from the husband's death (o).

This passage in Lord Coke's Commentary may, perhaps, be considered as relating to those instances only, where the heir has offered to endow the widow immediately after the death of

(m) Co. Litt. 33. a.

(n) Co. Litt. 32. b. in notis. 14 Ed.

(o) Co. Litt. 32. b. 33. a. Also Gilb. Dower, 375.

the ancestor, and she has refused to accept it (p).

In general, the infancy of the heir is a good dilatory plea to proceedings at law relative to his inheritance, but he is not allowed the privilege of non-age in actions of dower (q).

The statute extends to copyhold or customary lands when the widow is intitled to free-bench (r), and also to assignment of dower in equity; for the passage of Lord Coke's Commentary on the 36th section of Littleton, viz. "that if the wife have dower assigned to her in Chancery, she shall have no damages," alludes to the writ *de dote assignanda* issued by that court, and not to a *decree* of a court of equity; and the reason why no damages are recoverable upon this writ is, because the widow is not *deforced* of dower (s).

In the construction of so much of the statute of Merton as relates to damages given against deforceors of dower, it is settled that they are to be considered vindictive, and like damages in

(p) 2 Barnard. Rep. 180, 207, 443.

(q) 2 Brownl. 118.

(r) Co. Litt. 33. a. 4 Rep. 30. b.

(s) F. N. B. 263. 2 Bro. C. C. 631. Gilb. Dow. 412.

trespass,

trespass, if not recovered before the party dies, they die with him; accordingly, if the heir die or alien the lands before judgment, the widow's right to damages is gone, for she is not intitled to recover damages against the heir of the heir, because he is no deforceor; and for the same reason, the alienee is not liable to answer in damages (*t*). And if the widow die even after judgment obtained in dower, but before the damages are ascertained upon a writ of enquiry, they are gone by her death, so that no *scire facias* lies for her personal representative (*u*). Hence it is obvious, that the judgment for dower and the judgment for damages are distinct and independent, therefore the former may be affirmed in error, and the latter reversed at the same time (*x*).

Subject to these hazards is the wife's title to damages at law; but courts of equity (which seem now to have a settled concurrent jurisdiction with those of law in dower), have been more liberal towards the widow, from the consideration that the intermediate profits of a third part of the husband's real estate are her only subsistence, from the period of his death; if, therefore, the heir die *pendente lite*, it seems that his death, before the widow had an opportu-

(*t*) Keb. 85, 646, 711. (*u*) 3 Mod. 281. 2 Lord Raym. 1050.

(*x*) 22 Edw. IV. 46.

nity of establishing her right, will not in equity defeat her title to the mesne profits, but that she will be intitled to an account of them against his personal representative; for it would be unjust if the heir's denial of the widow's right to dower, and the accident of his death before the establishment of it, should be allowed to place her in a worse situation than if he had thrown no impediment in her way, and fairly and candidly admitted her claim (y); so that the most eligible mode of procedure for the widow to recover dower seems to be in Chancery, which right, if not admitted by the heir, the court will direct to be tried at law, retaining the bill in the mean time; and if she succeed in establishing such right, then upon the equity reserved, the court will administer to her full relief.

It does not appear to have been completely settled until of late years, that courts of equity had an original jurisdiction in dower with courts of common law; it seems to have been generally understood, that to lay a ground for the interference of equity, the widow must have stated some out-standing term, &c. which might be set up by the heir in order to defeat her just right at law (z). But this charge or allegation does not appear to be now necessary, as the

(y) 2 Bro. C. C. 620.

(z) 3 Atk. 131.

Court of Chancery has determined, that its jurisdiction in dower is concurrent with the courts of law, upon the principle of danger and difficulty to which the widow must be exposed in proceeding at law, when all the title-deeds are in possession of the heir, and she is totally unacquainted with the titles, values, and quantity of the lands, of which her husband died seized (a).

By the statute of Gloucester (b), the widow is intitled to costs as well as damages, if she recover dower at law; but in equity she will not be intitled to costs against the heir, unless he behave improperly in the conduct of his defence (c).

If the freehold of the lands, in which the widow is intitled to dower, be vested in several persons by different titles, as by distinct feoffments, each feoffee must be impleaded by the widow; for if she bring a writ of dower against one only, she will recover no more than a third part of the estate in the possession of such feoffee (d).

(a) 2 Bro. C. C. 620. 4 Bro. C. C. 294.

(b) 6 Edw. I. cap. 1. (c) 2 Bro. C. C. 632.

(d) Perk. sect. 423.

The difficulties and inconveniences which attended dower, has introduced a method, sanctioned and regulated by the legislature, of preventing this common law right of the widow, by making a provision for her *before* the marriage. This leads me to consider the last division of my subject, viz.

**FIFTH—How dower may be barred or prevented.**

Besides the various causes for which the widow may be deprived of dower mentioned in the former part of this chapter, she will be prevented from claiming it adversely by withholding the title-deeds of the estate in which she is dowable, for she is justly considered as unworthy to demand dower of her husband's inheritance, when she wrongfully detains from his heir the evidences by which he is able to defend such inheritance (e).

This plea, however, is allowed the *heir* only (f), and not even him, unless he be tenant of the freehold; therefore, if the feoffee of the husband vouch the heir, who enters into warranty, the latter cannot plead the detention of

(e) Co. Litt. 39. a. Petk. sect. 355, 356, 357. 9 Rep. 17. b.

(f) Co. Litt. 39. a.

charters,

charters, because he is not seized of the lands, nor intitled to the deeds, neither can he aver in his plea that he has always been, and is yet, ready to assign dower, if the demandant would deliver the title-deeds; which averment is necessary in such a plea; and the *feoffee* cannot plead detention of charters, because there is no privity between him and the widow, and no person can justify withholding dower but the heir. In conformity with this distinction, see the different cases stated in the report referred to (g).

One of two *coparceners* may plead detention of charters in bar of dower; for in this respect they are as one heir, and it is no objection that the other coparcener has an equal claim to the deeds (h).

The heir must shew such a degree of certainty in relation to the particular deeds withheld, as will intitle him to recover them in an action of *detinue* (i). But if the heir deliver the deeds to the widow, he cannot in the face of his own act plead her detention of them in bar of dower (k).

(g) 9 Rep. 18. a. Perk. sect. 358, 360.

(h) Perk. sect. 359.

(i) 9 Rep. 18. a.

(k) Ibid.

If a woman join with her husband in levying a fine, or suffering a recovery of the lands in which she is intitled to dower, that will extinguish her right, because there could be no other reason for her joining in those acts than to destroy such right, as she had no other interest in the estate, and the method adopted for the purpose was sufficient (*l*): and it seems, that if the wife had levied a fine *without her husband*, and he had not entered to avoid it, such fine would have extinguished her right (*m*). But it is said, that if the husband be seized of lands in fee, and a stranger levies a fine to him and his wife *sur conuzance de droit come ceo, &c.* and they *grant and render* the same to the stranger in fee, the wife will not be barred of dower by the *grant and render*, because she is not examined apart from her husband, and as a conveyance it is a mere nullity in regard to her (*n*).

Husband *alone* levies a fine with proclamations of his lands, and dies, his widow will be allowed *five* years after his death to make her claim; but if she neglect to do so, her right to dower will be destroyed (*o*).

(*l*) Plowd. 515. Cro. Eliz. 29. 10 Rep. 49.

(*m*) 10 Rep. 43. a. 7 Hen. IV. 23. 11 Hen. IV. 25.

(*n*) Bac. Abr. Tit. Dower (F) page 140.

(*o*) 2 Rep. 93. a. 10 Rep. 49, 99. 13 Rep. 20. Hob. 265. Dyer, 224. 2 Roll. Rep. 69, 409.—and Plowd. 373. contrâ is not law.

If the widow accept a lease for life of her husband's estate, in which she is intitled to dower, this will bar her of dower from the inconsistency of the two interests, which was the natural consequence of her own act; and for the latter reason, if she accept of a lease for years, she cannot claim dower during the term (p). But if a man seized in fee of lands, demise them to *A.* for a term of years, and then marries *A.*, and dies seized, it seems that *A.* may claim her dower presently, in which case the term will merge in her estate for life (q).

A widow intitled to dower out of lands limited to *B.* for life, with remainder to *C.* in fee, releases all her *right* to *C.*; if the widow, after this release, implead *B.* for dower, he may take advantage of the release made to *C.*, and so should *C.* after *B.*'s death be allowed the benefit of a similar release made to *B.*, because the dower arises out of both the estate for life and that in reversion; and when the *jus habendi*, which is the principal, is released, of consequence the action, that is but the mean to recover it, is also gone (r); but note, that a release of *all actions* only to *C.*, would not extinguish the widow's right, but would be of no effect, for

(p) *Perk.* sec. 350. *Gilb. Dow.* 391.

(q) *Perk.* sect. 351. *F. N. B.* 149. 6 *Hen. IV.* 7, 8.

(r) *Co. Litt.* 265. 1 *Rep.* 112. 8 *Rep.* 151.

*actio est jus prosequendi in judicio quod alicui debetur*; now the widow could not implead *C.* the releasee, because he is not tenant to the *præcipe*, nor liable to her demand; therefore, if *B.* were to plead to the writ of dower the widow's release of all actions to *C.*, her replication that *C.* had nothing in the freehold at the time of the release would be sufficient to avoid the plea; because it is a general rule of law, that to give validity to a release of *actions real*, the releasee must be tenant of the freehold either in deed or in law (*s*).

It has been observed that, in general, a widow's right to dower cannot be barred by a collateral satisfaction, as by assignment of other lands, or of a rent issuing out of them; for the widow being intitled to a vested freehold interest at her husband's death, it cannot be transferred or extinguished at common law, except by release; however, if a *devise* were made to her, expressing in direct terms that it should be in satisfaction of dower, the gift by will might be averred at law in bar of dower, so as to oblige her to elect between her common law right and the provision under the will (*t*).

(*s*) *Litt.* *sect.* 495. *8 Rep.* 151. *b. Cro. Jac.* 151.

(*t*) *McCor.* 31. *Co. Litt.* 36. *b. Cro. Eliz.* 128. *4 Rep.* 4. *a.*  
Dyer, 220.

Courts of equity have extended this doctrine a degree farther; for in cases where expression is wanting, but an irrefragable inference arises from the inconsistency of the provisions by will and the right of dower, that the former was intended in lieu of the latter, these courts have compelled widows to elect between them; indeed, as the claims of widows are particularly favoured, the late cases have required that it must not be shewn only that their husbands did not *intend* them dower, but that they *meant to exclude* their widows from it by their testamentary dispositions (*u*).

The rule of the common law, that the widow's acceptance of a collateral satisfaction was no bar to her demand of dower, united with the inconvenience that would have ensued after the passing of the statute of uses (*x*), the effect of which rule would have been to give a title of dower to the widow in such lands as were holden to the *use* of the husband, without depriving her of such as might be the subject of special settlement upon her before the marriage, induced the legislature, by the above statute, to enable the husband to bar effectually the widow's right to dower, by making a provision for her before

(*u*) 2 Ves. Jun. 572. 3 Ves. Jun. 249. 1 Bro. C. C. 292.

3 Bro. C. C. 347.

(*x*) 27 Hen. VIII. c. 10.

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(u) 2 Ves. Jun. 572. 3 Ves. Jun. 249. 1 Bro. C. C. 292.

3 Bro. C. C. 347. (x) 27 Hen. VIII. c. 10.

marriage in lieu of it, which is called a *jointure* (y). To make this more intelligible to the reader, he will understand, that before the making of the statute of uses, the greatest part of the lands in England was conveyed to *uses*; now as a wife was not intitled to dower of a *use*, her father or friends, upon her marriage, procured a settlement to be made of some particular estate to the use of the husband and wife for their lives in joint-tenancy, which would be a provision for the wife surviving her husband. The statute of uses destroyed the distinction between the *use* and the *possession*, declaring that the former should attract the latter, so that the legal estate or *freehold* no longer continued in the *feoffee*, but was instantaneously transferred to the *cestui que use*. After this statute, therefore, the husband became actually seized of the *freehold* whence dower would necessarily spring, and the widow would have become dowable of such lands as were held to the use of her husband, and intitled at the same time to the particular lands settled in jointure before the marriage, had not the statute made a contrary provision (z).

A *jointure* is thus defined by Lord Coke, from the purview of the act.—“A competent livelihood of the *freehold* to the wife of lands and

(y) 27 Hen. VIII. cap. 10. sect. 6.

(z) 4 Rep. 1. b. 2. a. 2 Black. Com. 137.

tenements to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least (a)."

In the construction of this statute, the following points appear to have been resolved,

1. The jointure must take effect *immediately on the death of the husband.*

Accordingly, if an estate for life be limited to *A.* (a stranger) beneficially, after the husband's death, and not merely during the husband's life, to preserve contingent remainders; or if the lands be limited to *A.* for a term of years, after the decease of the husband, and then to the widow for life for her jointure; these are not good jointures within the meaning of the statute, which did not intend to place widows in a worse situation in respect to this provision, than at common law in regard to dower; and the death of *A.*, or the expiration of the term during the husband's life, will not cure the defect (b). For *quod ab initio non valet, in tractu temporis non convalescet.*

2. The estate must be limited to the wife *solely,*

(a) Co. Litt. 36. b.

(b) 4 Rep. 3. Hutt. 51. Hob. 151. Winch. 33.

for if it be limited to her and another jointly, the provision is not within the statute (c).

3. Although the jointure be not absolutely and completely settled upon the wife by deed, but is *executory* only depending upon articles, or the covenant of the husband, yet it will be good in equity (d).

4. The estate of the wife must be certain; so that a settlement upon *A*, for life, remainder to *B*, for life, remainder to the use of *such woman as B. may marry*, is not a good provision by way of jointure on the wife of *B.*, because it is subject to the contingency of *B.* dying before *A.* (e); on which event, the widow of *B.* would be unprovided for during the life of *A.*

5. The estate in jointure must be for the wife's *own life* at least.

Hence an estate settled upon the wife *pur autre vie*, or for a long term of years, is no legal jointure (f); but if the estate be conditional, and may continue during her life, without her co-operate to defeat it, this will be a

(c) Winch 33.

(d) 2 Vern. 343. 3 P. Will. 277. 1 Ch. Ca. 100.

(e) Sid. 3, 4.

(f) Co. Litt. 36. b.

good

good jointure; accordingly, a limitation to the wife *durante viduitate*, will bar dower (g).

6. The jointure must be made *to herself*, and no other in *trust* for her.

Because the statute applies to cases only where the possession is executed in the widow upon a limitation of uses; that act merely intending to prevent the widow's right to dower in such lands, of which she would not have been dowable at common law, viz. of lands holden to the *use* of the husband (h).

7. The provision must be in *satisfaction* of dower *in toto*.

Accordingly, if the settlement be mentioned to be made in *lieu* of *part* of dower only, it is not within the act; for it is uncertain in respect of what part, and for how much dower, the satisfaction was intended to be made (i); yet it seems, that the widow would not at law be allowed to retain the provision in the settlement as a jointure, and at the same time to claim dower; for if she proceed to obtain judgment in a writ of dower, she thereby affirms that she

(g) 4 Rep. 3. a.

(h) Co. Litt. 36. b. 1 Atk. 561.

(i) 4 Rep. 3.

has a title to dower *only*, and is estopped to claim the lands in jointure (k).

8. If the provision by settlement be not *expressed in the deed*, as in full recompence of dower, it may be *averred* to have been so intended (l).

9. The jointure must be made *before* marriage.

This is expressly required by the statute; therefore, if the jointure be postponed till the marriage be consummated, the wife may waive it after the husband's death, and claim her dower (m); but if she then agree to it, as by entry, acceptance of rent, &c. with full knowledge of her right, she will be bound, and not allowed afterwards to dispute the jointure (n).

If a jointure of land be made upon the wife *before* marriage, and she during the coverture join with her husband in encumbering them (o), or absolutely disposing of them by fine or recovery; or if she levy a fine of them alone without the concurrence of the husband, and he does not enter and avoid it (p), the widow

(k) 4 Rep. 5. (l) Owen, 33. Co. Litt. 36. Gilb. on Uses, 151.

(m) Co. Litt. 36.

(n) 3 Rep. 26. a. 3 Leon. 272. Popl. 88. Gouls. 4, 84.

1 Ves. Jun. 335.

(o) 2 Chan. Ca. 162.

(p) 10 Rep. 43. a.

cannot claim dower after his death to the prejudice of her own acts; for she was barred of dower by the jointure, and it was her own fault to charge or dispose of the property comprised in it. But if the jointure be made *after* marriage, and she joins in any of the above acts, she will nevertheless be entitled to dower; for the estate in jointure being in this case only a *conditional* bar of dower, (i. e.) upon the wife's consenting to it after her husband's death, the disposition of the lands in settlement by fine will not prevent her exerting that right which accrued to her at the husband's death (q).

It seems, that if the jointure be made *before* the marriage it will conclude the widow, although she was an *infant* at the time of making it. This was one of the points determined in *Jordan v. Savage* (r).

10. *Copyhold* lands are not included within the statute of *uses*, and that part of it which relates to jointures; therefore a jointure of such lands will be no legal bar of dower: the reason is, that the words of the act being general, and introductory of a new law, viz. to bar widows of dower in contradiction to the common law; there was no inducement to extend such words

(q) Co. Litt. 36. b. Bulstr. 173.

(r) Bac. Abr. Tit. (Jointure) page 226. 3 Atk. 612.

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(*r*) Bac. Abr. Tit. (Jointure) page 226. 3 Atk. 612.

to include customary lands, particularly as an estate by copy is disadvantageous to the widow, who must pay a fine upon admission, which she may be unable to do, and thereby commit a forfeiture. Besides, widows are not intitled to dower by the general law of copyholds, which affords an inference, that customary lands were not within the contemplation of the legislature (s).

Such are the requisites of a good *legal* jointure. But courts of equity, proceeding upon a more extended scale, consider the widow bound by *acceptance* of the estate settled by way of jointure in lieu of dower, of whatsoever kind it may happen to be, as of a term for years, the trust of a term or copyhold lands, &c.

At law, if the jointure be not conformable to the statute, the widow may claim both the property intended as a jointure and dower; but equity here steps in, and by affecting the conscience of the widow, obliges her to *elect* between them, upon the principle, that it would be unjust for a person to claim both the thing settled, and the property in consideration of which such settlement was made.

(s) Gilb. Ten. 182.

The

The limitation of a jointure will *remit* the wife to a former right in the same lands (*t*). Accordingly, if a man covenant to stand seized to the use of himself in tail, remainder to his wife for life, remainder to *B.* in tail, and then makes a feoffment to the use of himself and wife for their lives, as a jointure for the wife, remainder to *C.*, and dies without issue, the wife will be remitted; for if she had been allowed to claim under the second title, she must have waived the first, and subjected herself to the action of *B.*, whose right would have commenced immediately upon her assent to take under such title (*u*).

But in cases where the widow's election (if exerted) would not prejudice another person, she will not be remitted, against her inclination, to her elder right; though if she make no election, she will be considered as possessed of the oldest title as most for her benefit.

Accordingly, if lands be given to the husband in tail, remainder to his wife for life, remainder to the *right heirs* of the husband, and then the husband makes a feoffment in fee to the use of himself and wife for their lives, remainder to the *right heirs* of the husband, and

(*t*) Cro. Jac. 490.

(*u*) Co. Litt. 348. a. 2 Roll. Abr. 422. (m) pl. 1.

dies without issue, the widow may elect between the two titles (*x*); for both titles of the widow are of equal validity, and the heirs of the husband are not prejudiced by her election, as in neither case they can claim in opposition to the feoffment of their ancestor.

If by any means, after lands are settled upon a woman in jointure, there is an excess, she will be intitled to the benefit of it; and *converso*, if there happen to be a deficiency, she must submit to the loss (*y*).

*Powers*, requiring certain formalities, are sometimes granted to tenants for life, to make jointures on women they may marry; if, however, such persons happen to omit any of the circumstances prescribed by the powers, in the attempt to execute them, or if they engage to execute the powers, but die without fulfilling such engagement, a court of equity will interfere on behalf of the jointress, and supply the defect. Accordingly, if a power require an *indenture*, and the execution is by *deed-poll*, or if the signing of the party is directed to be attested by *three* witnesses, when such signature is made in the presence of *one* or *two* persons only, and the like, these

(*x*) Co. Litt. 357. Dyer, 351. b.

(*y*) 2 Atk. 544.

mistakes will not be allowed to vitiate the execution of the power (z).

But if the tenant for life enter into no engagement to execute the power, nor shew any intention that he meant to do it, equity will not execute it for him, as that would be against the nature of a power, which is left to the free-will and election of the party whether to execute it or not (a).

The elopement of the jointress, and living in adultery with another man, is no forfeiture of her jointure, as it is of dower, whether such provision be made by a complete deed, or be executory only, as by articles; and the reason for this distinction between dower and jointure is, that the former is forfeited by act of parliament (b), but there is no such statute to deprive her of the latter (c).

If the jointress be in possession of the title-deeds, and the heir files a bill in Chancery to obtain them, alleging that his ancestor had no power to make a jointure, the court will not compel the widow to produce and deliver them

(z) 2 Vern. 379. 2 P. Will. 222, 490. 1 Atk. 563.

(a) 2 P. Will. 490. (b) Westm. 2. cap. 34.

(c) 3 P. Will. 277. 5 Ed.

up, unless he will submit to confirm her title; and the same law prevails in cases of dower (d).

2. *The wife's power over her husband's real estate.*

Previous to the statute 11 Hen. 7. cap. 20. the alienations of tenants for life with warranty, except of tenants by the curtesy, which was provided against by the statute of Gloucester (e), barred the heirs of the warrantors. The reason was this:—In *lineal* warranties, which were so called when the heir derived, or might by possibility have derived, his title to the lands warranted either from or through the ancestor who made the warranty, the heir was bound though no assets descended upon him, on the principle, that if he was permitted to succeed to the estate aliened, as he must then claim it as heir to the warranting ancestor, it would on that event become assets in his hands to answer the warranty. The same rule was with less reason applied to *collateral* warranties, so denominated when the heir's title to the land neither was nor could have been derived from the warranting ancestor; upon a presumption of law, that although the heir might not at that period

(d) 1 Vern. 479. 2 Vern. 701. 2 Bro. C. C. 650.

(e) 6 Edw. I. cap. 3.

have

have assets from the warranting ancestor, he might afterwards have them by descent, either from or through such ancestor. Accordingly, at common law, if the widow had aliened in fee with warranty the lands which she held in dower or in jointure for life, the discontinuance could not have been defeated by the heir on account of the warranty. In order to remedy this inconvenience, a statute was made in the reign of Henry the Seventh (*f*), by which it was enacted, “That if any woman having an estate in dower, or for life, or in tail jointly with her husband, or to herself only, or to her use, in any manors, lands, tenements or other hereditaments, of the *inheritance or purchase of her husband*, or given to the husband and wife, in tail, or for life, by any of the ancestors of the husband, or by any other person seized to the use of the husband, or of his ancestors, and being sole, or with any after-taken husband discontinue, alien, release, or confirm with warranty, or by covin suffer any recovery against them, all such recoveries, discontinuances, alienations, releases, confirmations, and warranties, shall be void. And every person to whom the interest, title, or inheritance, after the death of the woman, in the manors, &c. should belong, may enter, &c. as if no discontinuance, warranty, or recovery, had been made,

(*f*) 11 Hen. VII. cap. 20.

M 2

entered

entered into, or suffered. And that if such husbands and women, or any other person seized to their use, make such discontinuance, &c. the persons to whom the manors, &c. should belong after the decease of the women, may enter into and hold the same according to such title and interest as they would have had if such women had been dead, and no discontinuance, &c. made, as against the husband during his life, if the discontinuance, &c. be had by or against the same husbands and women during the marriage between them; provided the women after the death of their husbands may re-enter into the same manors, and enjoy the same according to their first estate. But if they happen to be *sole* at the time of the discontinuance, &c. they shall be barred of their interests for ever, and the persons to whom the title, interest, and possession should belong after the death of such women, may enter, &c. provided the act shall not extend to any recovery or discontinuance to be had, where the heirs next inheritable to the women, or where the persons that next after the death of such women should have an estate of inheritance, assent to the said recoveries, when such assent is of record or inrolled."

In the construction of this statute the following points seem to have been determined:

Although

Although the act mentions a woman having an *estate* in dower, these words have been considered as extending to a mere *title* to dower; so that if a widow before endowment levy a fine, it is a forfeiture by the statute (g).

Estates in dower, for life, and in tail, being only mentioned in the statute, it has been decided, that lands given to, or settled upon, the wife by the husband or his relations *in fee-simple*, is not within its meaning; for general restraints of alienation annexed to limitations of absolute estates of inheritance, being repugnant, and against the rule of the common law, it could not be presumed, that the legislature intended to countenance and give effect to such restraints by a statutable provision, when the words of the statute are insufficient for the purpose (h).

*Copyhold* lands are not within the statute; for an entry being given to the person that would be intitled to the lands aliened upon the woman's death, if the act were construed to include copyholds, such person would become tenant to the lord without admission, which would infringe upon the lord's rights (i).

(g) 2 Leon. 168. 3 Leon. 78.

(h) 4 Rep. 3. b. Moor. 716. Cro. Eliz. 524.

(i) 2 Sid. 41, 73. 2 Ves. 359. Gilb. Ten. 181.

The statute expressly mentions lands holden to the *use* of the wife, so that it extends to modern *trusts*, and also to equities of redemp-  
tion, for what are now called trusts, were at the time of passing that statute known by the name of *uses* (k).

It is said by Lord Coke to have been ad-  
judged, that if a man seized of lands in fee, levy a fine to the use of himself for life, re-  
mainder to the use of his wife, and the heirs male of her body by him, for her jointure, and they, having issue male, levy a fine, and suffer a reeover, and then die, the issue male may enter under the statute, upon the principle, that although the case is not within the act, yet it is within the spirit and meaning of it, which intends to provide for the children of the marriage (l). This case, however, is clearly over-ruled by that of Kirkman *v.* Thompson (m), which decided, that the alienation of the husband and wife of lands settled upon her in tail *ex provisione viri*, would bar the issue of the marriage, and was no forfeiture either within the letter or meaning of the statute, which extended only to discontinuances by *widows*, or *by them and their after-taken husbands*.

(k) 2 Vern. 489. 1 Eq. Ca. Abr. 220. (l) Co. Litt. 365. b.

(m) Cro. Jac. 474.

The principal object of the statute being to prevent only the discontinuances of women of the lands of their husbands, to the prejudice of the heirs of such husbands, to whom the same were limited; it has therefore been holden, not to extend to lands which originally belonged to the wife, or were derived from her ancestors, or even to lands belonging to the husband, when they were not given to his issue, but to the issue of the wife in tail general. Accordingly, if a man be seized of lands in the right of his wife, and levy a fine, taking back from the conufee an estate in special-tail, remainder to the heirs of the wife, and they have issue, and then the husband dies, and the wife marrying again, she and her second husband levy a fine. This is directly within the letter of the statute, and yet not within its meaning, because it was originally the wife's estate (n). And it is said to have been adjudged, upon the same principle, that if the husband be seized of lands in right of his wife, and both join in levying a fine, and the conufee grants a *rent* to them in tail, and the husband, having issue, dies, and then the widow aliens the rent, the disposition is not within the provision of the statute (o).

(n) Co. Litt. 366. a. Plowd. 459, 462. Keilw. 214. Cro. Eliz. 524. Moor. 715.

(o) Cro. Eliz. 2.

*Similiter*, if lands be given to husband and wife, before marriage, in fee-simple, and afterwards the husband and wife levy a fine of the *whole* to the father, who grants it to them again in tail, the husband's moiety only is within the statute, for the first gift of the father in fee-simple was not within the act, so that the donees took in moieties in their own rights; therefore, when the husband and wife joined in the fine, their several shares passed to the father, the one from the wife, and the other from her husband, so that upon the re-grant, the wife's moiety could not be considered as proceeding from the husband's ancestor, within the intent and meaning of the statute (*p*).

Husband seized in fee, *devised* lands to his wife in tail *general*, remainder over to a *stranger*, the wife married again after her husband's death, and suffered a recovery, the daughter of the first husband entered for the forfeiture; but it was determined, that although the case was within the *letter* of the statute, yet it was not within the *intention* of it, as the remainder was limited from the heirs of the husband to a stranger (*q*).

(*p*) *Moor.* 715. *Cro. Eliz.* 524. *Cro. Jac.* 175.

(*q*) *Cro. Eliz.* 2. *1 Leon.* 261. *Com. Rep.* 369.

If the husband or his father being seized of lands in fee, enfeoff *B.* upon condition to regrant the same to the husband and wife in tail, which is accordingly done; this is an intail within the meaning of the statute, that is, a gift to the wife by the provision of her husband or his ancestor, though it does not seem to be within the letter of the act, as the tenants in tail claim under *B.* the feoffee (*r*).

If the transaction be in contemplation, or in consequence of marriage, although the wife or her relations may advance *money* to the husband or his friends, in consideration of the lands settled on her in jointure, that circumstance will not except the case out of the act, but the whole transaction will be considered as relating merely to the marriage, and the lands settled upon the wife, a provision by the husband or his friends for the wife within the letter and meaning of the statute.

Accordingly, in a case where *A.* being seized in fee of lands covenanted with *B.*, in consideration of 200*l.* paid by *B.*, and of a marriage between *C.* the son of *A.*, and *D.* the daughter of *B.*, to convey the lands to the use of *C.* and *D.*, and the heirs of the body of *D.*, and to

(*r*) *Moor.* 93. *Cro. Eliz.* 513. *3 Rep.* 50. *S.C.* 2 *And.* 44.  
*Moor.* 455.

his right heirs; the marriage took effect, and the lands were settled; there was issue of the marriage, and then *C.* made a feoffment of the lands, and levied a fine with the wife to the feoffee; one of the questions was, Whether this settlement on the wife being made in consideration of *money* paid by the wife's father, as well as of the marriage, was within the statute? and it was resolved in the affirmative (*s*).

Upon the same reasoning, if the *estate belong to the wife's father or relations*, payment of *money* by the husband or his friends in consideration of the marriage, will not make him or them purchasers within the meaning of the statute (*t*); for the estate moving from the wife's father or relations, is not within the words or intention of the act, which was chiefly made for the benefit of the husband's heirs, who before the passing of it were frequently disinherited by the discontinuance of the widow; and with respect to the money paid by the husband or his friends, it is not considered in the nature of a purchase of the specific estate, but advanced in consequence, and as a part of the marriage-  
contract.

If, however, the transaction be between a

(*s*) Cro. Jac. 474. Dyer, 146. Keilw. 208. Moor. 93.

(*t*) Cro. Jac. 624. Cro. Car. 244. Jon. 254.

stranger, the wife's friends, and the husband; and the stranger, in consideration of a sum of money paid by the husband and the friends of the wife, convey lands to the wife in jointure, this would be considered *a purchase* of the husband, within the letter and meaning of the statute (u).

It is said, that if husband and wife join in selling her estate, and purchase other lands with the money, which are settled on both, this is a jointure within the act; because the money was a chattel vested in the husband, which he might have disposed of as he pleased; so that when he invested it in the purchase of other lands, and settled them upon himself and wife, the law will consider such purchase and settlement as a jointure on the wife, within the meaning of the statute (x).

It seems that the lands, in order to be of the purchase of the husband within the act, must be for a *valuable* consideration, a consideration merely good and meritorious not being sufficient; accordingly, in a case where *A.* in consideration of the *good service* done by *B.*, his domestic male servant, and in contemplation of a marriage between *B.* and *C.* the cousin of *A.*,

(u) Moor. 250.

(x) Palm. 217.

enfeoffed *B.* and *C.* of lands in tail, &c. Upon a question whether this was a jointure on the wife *ex provisione viri* within the statute, the determination was in the negative, because the consideration of service, &c. was not such a valuable consideration as the act required (*y*).

Husband and wife joint-copyholders in fee, the former in consideration of money paid to the lord of the manor, purchases the freehold and inheritance of the lands, which are limited to the husband and wife in tail, the husband dies leaving issue, and the wife enters and suffers a recovery; this is a forfeiture within the statute, for the copyhold tenure was extinguished by the purchase and acceptance of the new estate (*z*).

Feme tenant in tail *ex provisione viri*, accepts a fine *sur conuance de droit come ceo*, &c., and thereby grants and renders the lands for 1000 years, this is an alienation within the statute, though no discontinuance; for if a different construction were made, the act would be of little effect (*a*).

(*y*) Cro. Jac. 173. Noy, 122. Yelv. 101. Moor. 683.

(*z*) Cro. Eliz. 24.

(*a*) 3 Rep. 51. b. Cro. Car. 234. Cro. Eliz. 514. 2 Leon. 168.  
3 Keb. 436. Sir W. Jones, 60.

The reason why such a lease is not within the letter of the statute, arises from the construction put upon the words discontinue, alien release or confirm with warranty; for the act being made principally to facilitate the remedy of the husband's heir against the wife's *discontinuance*, these words are construed to extend to such acts only as effect discontinuances, so that conveyances, which in their nature do not create discontinuances, are neither within the letter nor restraint of the statute, as mere leases for years, releases or confirmations without warranty. Accordingly, a lease for twenty-one years, granted by a woman tenant in tail *ex provisione viri*, not warranted by the statute of Henry the Eighth (*b*), is no forfeiture, and can only be avoided by the issue in tail; therefore, if such issue levy a fine during the widow's life, it will be binding upon the issue in tail and his conusee, and also upon those in reversion during the continuance of the intail, for the following reasons: At common law, such a lease was conclusive against the issue of the lessor, and against all other persons, if made after issue born; and the only alteration effected by the statute *de donis conditionalibus* (*c*) in this respect, relates to the issue in tail, and those in reversion after the natural determination of the estate-

(*b*) 32 Hen. VII. cap. 28.

(*c*) 13 Edw. I. cap. 1.

tail; so that such a lease was obligatory upon all persons, except the issue in tail and the persons in reversion. Then the issue, by levying a fine during the life of tenant in tail, having barred the intail *quodād* such issue, and every person claiming *per formam-doni*, the lease of the widow was necessarily good, as there was no person who could by possibility defeat it; for the issue in tail could not do so in opposition to his fine, and his conusee could have no such right, as nothing passed by the fine, and the reversioner could not enter during the existence of any person inheritable under the intail; and with respect to the statute 11 Hen. VII. an ordinary lease for years is not within its provisions, for the reasons before assigned. And although the issue in tail had been intitled to the reversion in fee, expectant upon the determination of the estate-tail, which reversion would have passed to his conusee, it would have made no other difference in regard to the lessee than as follows: while there was issue in existence who could inherit under the intail, the lease could not be impeached; for although the estate-tail was extinguished by the fine *quodād* the issue, yet it was *in effe quodād* strangers during the existence of any person who might have claimed under it, so that the lessee would be intitled to take advantage of the legal continuance of the intail, which brings his case within the reasoning just stated. But if there should be a failure of persons

sons capable of inheriting under the intail during the term, the conusee of the issue might avoid so much of it as remained unexpired, for then the reversion is let in, which he claims paramount the lease, and the interest of the lessor (d).

If the widow demise such lands for the life of the lessee, or for three lives, not warranted by the act of Henry VIII (e), these would be alienations of the freehold within the statute of Henry the Seventh now commented upon, and the issue may enter immediately; for such leases by tenants for life, or in tail, are discontinuances without the addition of warranty (f).

Although the words of the statute appear to extend only to recoveries, suffered by the wife alone or jointly with a subsequent husband, yet if they come in as *vouchees*, it is within the intention of the act, and therefore a forfeiture (g).

The statute, according to its *letter*, avoids to all intents and purposes covinous recoveries, warranties, &c. yet the conclusion of law has been different in analogy to similar cases

(d) Cro. Jac. 688. W. Jo. 60. 2 Roll. Rep. 490, 498.

(e) 32 Hen. VIII. cap. 28.

(f) 3 Rep. 50. b. Cro. Eliz. 514. S. C. (g) Moor. 715, 716.

upon other statutes (*h*); so that discontinuances, &c. by widows alone, or with their after-taken husbands, are not void *immediately*, but must be made so by the *entry* of the persons to whom the interest, title, or inheritance would belong, if the feme-discontinuors were then dead (*i*). With respect to all other persons, and particularly the parties to the discontinuances, &c. such discontinuances, &c. are good and binding. Pursuant to these distinctions, if the issue in tail levy a fine, having a right to the *intail only*, neither he, his issue, nor conusee, can enter upon the lands discontinued; the two former, because they are bound by the fine; the latter, because the fine operating merely by *estoppel*, he has no title to the lands, and could not enter if the woman were dead (*k*). But if the issue be seized of the reversion or remainder in fee at the time of the fine levied, although the issue are concluded by such fine, yet the conusee may enter in respect of the reversion or remainder which passed to him by the fine, as he is the only person who would be intitled to the estate upon the death of the discontinuor (*l*). And note, the different periods allowed by law to entries under this statute to defeat the discontinuances of widows made of their hus-

(*b*) 3 Rep. 60. b.      (*i*) 27 Henry VIII. 23. b. 3 Rep. 59. b.

(*k*) Cro. Jac. 175. Noy, 122.

(*l*) 3 Rep. 51. Cro. Eliz. 514. Moor. 455.

band's lands, when the issue in tail has disabled himself by fine; and to entries made under the statute *de donis*, to avoid the leases of tenants in tail, when his issue has barred himself by fine, and extinguished the intail.

Widow tenant for life *ex provisione viri*, remainder to the heirs male of the husband's body; *C.*, the first son in tail, suffered a recovery with single voucher, by agreement that the recoverors should enfeoff *B.* to uses, and that the widow, for better assurance, would release to *B.* with warranty; which feoffment, release, and warranty, were made accordingly in the life of *C.*, who died after surviving the widow. All objections to the validity of the recovery being waived by the manner of pleading, the question was, whether the issue-male of *C.* were bound by these transactions, or might enter for a forfeiture under the statute? and it was determined, that they were barred by the ancestor's recovery, and the release and warranty of the widow.—First, because the intention of the statute was to restrain women from making a discontinuance, warranty, and recovery, in bar or to the prejudice of the heir in tail, or them in remainder, &c. But when the heir in tail conveys and assures the land to others, and the release and confirmation of the woman with warranty, is but to perfect and corroborate the estate which the heir in tail has made, such warranty is not restrained

by the act; for it shall be presumed for the benefit of the heir, and not to his prejudice.—Secondly, because the widow with the heir in tail might have joined in a fine and barred the estate-tail, or she might have surrendered her life-interest to him, and then by a recovery the intail would have been defeated, so that the widow and the issue in tail had the power to bar the intail, and the reversion or remainder expectant upon it; therefore it was not the intention of the act to restrain the warranty of the widow made to the alienee of the issue in tail.—And thirdly, because *C.*, the heir in tail, having disabled himself from taking advantage of the forfeiture given by the statute, in consequence of the recovery against him by his own agreement, his issue male, after his death, should not be permitted to take the benefit of the statute, because *C.* was living at the time of the forfeiture, and could not enter; and a person not in *rerum natura*, or who has not the immediate interest, title, or inheritance, at the time of the forfeiture, shall not take advantage of the act when another person was in existence at the time of the forfeiture and could not enter, and had power to bar, by fine or recovery, him who would claim the benefit of the statute (*m*).

(*m*) Lincoln College's case. 3 Rep. 58. b. 2 And. 31.  
Moor. 255.

Since the determination of the above case, a statute has been made which makes void all warranties by any tenant for life against those in remainder or reversion (*n*) ; it seems, therefore, that in the case just stated, the warranty of the widow-tenant for life being void against the remainder in tail in the heirs of the husband, would not prevent the issue setting aside the recovery for error ; so that the entry of the issue for the forfeiture would be precluded no longer than while the recovery continued in force.

Feme tenant in tail of the provision of her husband, suffers a recovery, and then the issue in tail releases to the recoveror, the issue of the releasor may enter under the statute ; for immediately upon the recovery suffered, a right of entry became vested in the issue, and by a mere deed of release the first issue in tail cannot bar his descendants of such a right (*o*). So note the distinction, when the discontinuance is made prior to the disability of the issue in tail, and when after, in relation to the effect of the transaction to deprive the subsequent issue in tail of the benefit of the statute. And in Lincoln College's case before in part stated, it was said, that if the widow had released after the death of *C.* the

(*n*) 4 Ann. cap. 16. sect. 21.

(*o*) Doct. and Stud. Lib. 1. cap. 31. 3 Rep. 61. 2.

by the act; for it shall be presumed for the benefit of the heir, and not to his prejudice.— Secondly, because the widow with the heir in tail might have joined in a fine and barred the estate-tail, or she might have surrendered her life-interest to him, and then by a recovery the intail would have been defeated, so that the widow and the issue in tail had the power to bar the intail, and the reversion or remainder expectant upon it; therefore it was not the intention of the act to restrain the warranty of the widow made to the alienee of the issue in tail.—And thirdly, because *C.*, the heir in tail, having disabled himself from taking advantage of the forfeiture given by the statute, in consequence of the recovery against him by his own agreement, his issue male, after his death, should not be permitted to take the benefit of the statute, because *C.* was living at the time of the forfeiture, and could not enter; and a person not in *rerum natura*, or who has not the immediate interest, title, or inheritance, at the time of the forfeiture, shall not take advantage of the act when another person was in existence at the time of the forfeiture and could not enter, and had power to bar, by fine or recovery, him who would claim the benefit of the statute (*m*).

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Feme tenant in tail of the provision of her husband, suffers a recovery, and then the issue in tail releases to the recoveror, the issue of the releaseor may enter under the statute; for immediately upon the recovery suffered, a right of entry became vested in the issue, and by a mere deed of release the first issue in tail cannot bar his descendants of such a right (*o*). So note the distinction, when the discontinuance is made prior to the disability of the issue in tail, and when after, in relation to the effect of the transaction to deprive the subsequent issue in tail of the benefit of the statute. And in Lincoln College's case before in part stated, it was said, that if the widow had released after the death of *C.* the

(*n*) 4 Ann. cap. 16. sect. 21.

(*o*) Doct. and Stud. Lib. 1. cap. 31. 3 Rep. 61. a.

heir in tail who suffered the recovery, *C.*'s issue might have avoided the warranty under the statute.

In the same case Sir *Edward Coke* says, he conceives, that if a man make a feoffment in fee to the use of himself and wife in tail, remainder to the use of the husband in fee, and has issue a *daughter*, and dies leaving his wife *enseint* of a *son*, whereby the reversion in fee descends to the daughter, if the wife and daughter join in levying a fine, or suffering a recovery before the birth of the son, or if the widow alone levy a fine or suffer a recovery, and the daughter neglects to enter, or by some other means disables herself from taking benefit of the act, yet the son may enter under the provisions of the statute; because the daughter does not claim the lands by *purchase* in nature of a perquisite, but *per formam doni quasi* by *descent*; and by the express words of the statute, the persons to whom the lands belong *after the decease of the woman*, shall enter into the tenements, and enjoy and possess them according to such title and interest as they shall have, if such woman had been dead, and no discontinuance, warranty, or recovery made; the daughter, therefore, claims the lands under the act, according to her title, as if the woman had been dead, without doing any thing to incur the penalty of the statute, and that is *per formam doni*, according to

to which the after-born son is to be preferred to the daughter (*p*).

It may be useful to observe, that the principle which induces Courts of Equity to direct marriage-settlements to be framed in such manner as will best answer the intention of the parties and the purposes of the marriage-contract, notwithstanding the articles entered into prior to the marriage, if pursued literally, would not have that effect, does not apply to limitations of the husband's lands in jointure to the wife in tail, by articles in contemplation of a subsequent settlement. To illustrate this, if articles are made before marriage with a view to a future settlement, limiting real estate to the parents for their lives, and during the life of the survivor, remainder to the *heirs of their or either of their bodies*, the limitation to such heirs will be considered words of *purchase*, and a settlement directed accordingly, viz. after the life-estates to the parents, *to their first and other sons in tail*; and for this obvious reason, if an estate-tail was given by the settlement to the husband and wife, or to either of them, as directed by the articles, *the father alone during the marriage, or the settling parent alone after the death of the other*, might bar the issue, and defeat a principal part of the settlement;—the intended provision for

(*p*) 3 Rep. 61. b.

N 3

the

the children of the marriage (q). But it has been determined, that if neither the father alone, nor the surviving parent alone, can defeat the settlement, if made pursuant to the articles giving the intail, equity will not interfere and direct a strict settlement, merely because both parents may be intitled to bar their issue by fine or recovery; for such power might be left in both for prudent and wise purposes, and is not inconsistent with the probable intention of the settlement; so that if lands *ex provisione viri*, were agreed by marriage articles to be settled on the husband and wife for their lives, remainder to the heirs of the body of the wife by him, the court will not interpose and make a different settlement; because the husband alone cannot by any act destroy the intail in the wife during the coverture, and she cannot do so alone after his death, being restrained by the Statute of Henry the Seventh (r).

(q) 1 Eq. Ca. Abr. 387, 392, 393. Gilb. Rep. 114. Forrest.

176. 1 Bro. Parl. Ca. 470.

(r) 1 P. Will. 123. 2 Ves. 358. 2 Atk. 473. 1 Bro. C. C. 584.

3. *The interest of the wife in her husband's personal estate.*

If the wife survive her husband, who happens to die intestate leaving children, and no settlement is made upon the marriage to the prejudice of her right, she will be intitled, by the statute of distributions (s), to a third part of his personal estate; and if there be no child, or children, then to a half. But this interest of the wife is under the absolute power and controul of the husband; for if he make a will, and dispose of his personal estate, she can claim no part of it in opposition to such disposition.

When the husband makes a gift to his wife of articles to be *worn as ornaments of her person* only, such articles are to be considered as her *paraphernalia*.

It is a consequence to be deduced from the nature of this donation, that the wife cannot dispose of the specific things given; for such a power would be contrary to the husband's intention (t).

(s) 22 and 23 Car. 2: cap. 10.

(t) 3 Atk. 393.

They are liable to the debts, engagements, and alienation of the husband during his life, but not subject to his disposition by will (u).

This interest of the wife is so much favoured by Courts of Equity, that if the husband die indebted, and her paraphernalia are taken by his specialty creditors in satisfaction of their demands, after all the personal estate is exhausted, she will be allowed to stand in the place of such creditors to reimburse herself out of the real assets in the possession of the *heir*, the amount of her paraphernalia received by the creditors (x). And if the husband pledge or incumber his wife's paraphernalia, she will be intitled to have them disencumbered out of his general personal estate, to the prejudice of *legatees*; for her right is anterior, and to be preferred to their claims, which are merely voluntary (y).

The interest that the wife takes in the personal estate of her husband, being a subject necessarily connected with the disabilities of *coverture*, I shall postpone the consideration of it at present, and proceed to treat,

#### LASTLY—Of the disabilities of *coverture*.

(u) 2 Atk. 78. 3 Atk. 358. (x) 3 Atk. 369.

(y) 1 P. Will. 730. 3 Atk. 370, 395.

The disabilities attending *coverture* are created by policy of law for two reasons; first, to prevent, as far as human precaution can do, the regard the wife is supposed to entertain for the husband, and his influence over her, from stripping her of all her property during the marriage; and secondly, to exempt the husband from her engagements and contracts to which he is not privy and consenting; for if she, who of the two is reasonably presumed to be most exposed to imposition, were allowed to bind the husband by her sole acts, the consequences might prove the ruin of both, and of their family. It is, therefore, a general proposition, that the sole deeds of married women are void (z); accordingly, if a married woman execute and deliver a deed to another as an *escrow*, and the husband dies, and then the grantee performs the condition, upon which the person to whom the deed was delivered, gives it to the grantee as the woman's deed; it is void (a); because the instrument receives its inception from the *first* delivery, and its completion on performance of the condition, and the *second* delivery is merely the execution and consummation of the first (b); so that the grantor being under the disability of *coverture* at the time of the deed's first delivery, the subsequent death of the husband before the grant-

(z) *Perk. sect. 6.*

(a) *Perk. sect. 11.*

(b) *5 Rep. 84. b.*

tee's compliance with the terms of it, will not remedy the original defect. But if the wife had been single at the period of the *first* delivery, and afterwards, but before the grantee complied with the conditions upon which it was to be his deed, she took a husband, the marriage would not defeat the deed; for the instrument commencing in effect from the *first* delivery, amounted à *relatione* to the deed of a *feme sole* (c).

Notwithstanding the wife's disability during the marriage, there is one method by which she and her husband may convey away her estate effectually, viz. by *fine*, that being a judicial act, and the wife examined separately from her husband; every expedient, therefore, is adopted to prevent her being imposed upon, by explaining the transaction to her, and to discover whether she be acting voluntarily or by duress. Lord Hobart, in considering this mode of conveyance by married women, expresses himself to the following effect:—“Note, says he, a conflict of two laws, of *nature* and *equity*; but the one is predominant, and yet the law of the land, for necessity's sake, of commerce, and the like, by a law of policy, makes bold with the law of nature, in a special kind, and therefore allows a fine levied by the husband and wife;

(c) *Perk. sect. 9.*

because

because she is examined of her free-will judicially by an authentical person, trusted by the law and by the king's writ, and so taken in a sort as a sole woman" (d).

If the wife alone levy a fine with proclamations of her estate, it will bind her and her heirs, because they are *estopped* from claiming any thing in the land, and will not be permitted to shew that she was *covert* at the time (e). But the husband may enter and defeat the effect of it, in which event the wife and her heirs will be restored to their estate; for by the husband's entry, the whole estate of the *conusee* is defeated, and the ancient interest of the wife re-vested (f); and it seems that the law would be the same if the wife alone suffered a *recovery* of her estate (g).

This liberty of alienation being allowed the wife during the marriage, if she mortgage or pledge her estate for payment of the husband's debts, she will be intitled in equity to resort to his assets to have it exonerated from the charge, upon the ground that her estate was no

(d) Hob. 225.

(e) 17 Edw. III. 52. and 78. 17 Affi. pl. 17. 10 Rep. 43. a.

(f) 7 Rep. 8. a. and b.

(g) 1 Roll. Abr. 346. pl. 50. Com. Dig. Tit. Bar. and Feme (p). 1.

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more than surety for re-payment of the money advanced to the husband (*h*). It seems, however, that this equity of the wife may be repelled, by proving that the money was never received by or applied to the use of the husband, but appropriated to discharge a debt owing from the wife, in which case the principle upon which she is intitled to exoneration by her husband's assets will be removed. But if the transaction purport, not only by the instruments themselves, but by all the other evidence, except parol, to be a transaction to raise money for the husband, and he therefore bound to pay, Lord Thurlow is reported to have said, in *Clinton v. Hooper* (*i*), that he entertained great doubts whether it was possible to apply parol evidence to that transaction itself to prove it different.

By a statute made in the reign of George the Second (*k*), a married woman interested in leases for lives or years, may by herself, or by any other person on her behalf, upon motion or petition to the Court of Chancery, &c. and order made thereon, *by deed without fine*, surrender such leases, and accept new ones, to and upon the same uses, trusts, &c. as the old were subject.

(*b*) 1 P. Will. 264. 2 Atk. 384. 3 Bro. C. C. 545.

(*i*) 1 Ves. Jun. 188.

(*k*) 29 Geo. II. cap. 31.

It seems to be a natural deduction from the principles upon which the disabilities of *couverture* are founded, that those cases must be excepted out of the general rule, in which the interests of the husband and wife are not in the least affected by her separate acts. Accordingly, if lands be given to a married woman upon *condition to sell* (l), or if she have a mere *power* to appoint real estate, and executes it alone (m), or if a devise or feoffment be made to her upon *condition to convey* to another person (n), or if she alone make grants of copyhold estates (o), the wife, as to all those purposes, will be considered in the light of a *feme sole*; for she is an *instrument* only in such cases, and departs with no interest either from herself or husband.

A difference has been taken in relation to this subject, between a *power*, a *condition*, and a *trust*, permitting the two former to be executed and performed by the wife alone, but requiring the concurrence of the husband to the execution of the latter, as the whole legal fee is vested in her: *Jones* was of this opinion in *Daniel v. Upley* (p), and differed from *Whitlock*

(l) *Br. cui in vitâ*, pl. 16. *Br. Devise*, pl. 12.

(m) *Noy*, 80. *Lat.* 9, 39, 134. *Finch.* 346. *1 Ves.* 21. *Co. Litt.* 112. a.

(n) 2 *Roll. Rep.* 68, 175. (o) 4 *Rep.* 23. 8 *Rep.* 63.

(p) *W. Jo.* 137.

and

and Dodridge, who determined, that there was no foundation for the distinction; but when it is considered, that trusts are not cognizable in courts of common law, the single opinion of *Jones* may, perhaps, appear the most consistent and correct; for as those persons who preside there cannot see officially the special purpose of the conveyance to the wife, she is at law seized of an estate of inheritance in her own right, to which the husband becomes intitled during their joint lives at the least. It should seem, therefore, that the wife cannot, by her act alone, transfer this apparent interest of the husband without his concurrence, and particularly by a conveyance, which *prima facie*, from the circumstance of being *voluntary*, appears to be injurious to his right.

Another exception to this rule is, when the husband has notice of the wife's intention and purpose to do the act, and he assents to it, or at least expresses no disagreement, which amounts to a consent by implication: thus, it is said, if the wife sell her husband's goods, his agreement or acquiescence will effectuate the disposition (q). And if she seal a bond in his presence, and he express no dissatisfaction or dissent to the act, he will be bound by it (r).

(q) Bro. Done, pl. 4.

(r) 2 Freem. 215.

By the custom of the city of London, a married woman is enabled to carry on trade as a *feme-sole-merchant*, without the interference of her husband. As a necessary incident to such power she may incur debts by simple-contract, which will bind her property in trade; but if it be insufficient to satisfy them, she may be *committed to prison*, and the husband or his property will not be answerable for such engagements (s). In *Read v. Jewson* (t), Lord Mansfield said, no instance had been shewn in which a *feme-covert* sole trader could execute a *bond*; and that although she was liable to simple-contract debts, she could not give a bond. She is, however, liable to a commission of bankrupt as a *feme-sole* trader, which is advantageous to her, for a different construction would subject her to *perpetual imprisonment* (u). The husband has power to prevent the wife's separate trading *in futuro*, but he cannot determine it in retrospect; and it seems, that if he put an end to the wife's separate trading, after her debts are paid, he may possess the surplus of her property, for the custom does not interfere with any marital rights, but regards only trade and commerce (x). It may be inferred, therefore, that if the husband die before her, without determining her interest as a

(s) 3 Burr. 1776. (t) Stated in 4 Term. Rep. K. B. 362.

(u) 2 Black. Com. 477. Com. Dig. 521. 1 Atk. 206.

(x) 3 Burr. 1782, 1785.

feme-sole trader, and possessing the property employed in it, such property will belong to the wife.

The husband's assent or agreement to the separate acts of his wife, will in some cases be implied. Thus if the wife contract for articles, which are necessary and suitable to her situation in life, the engagement will bind him, upon proof that such articles were received by her, and properly applied (y). And if the *bonâ fide* creditor of the wife happen to be deprived of redress at law, as when *money is advanced* by him to the wife, to purchase necessaries, which is so applied by her, a Court of Equity will interfere, and permit the creditor to stand in the place of those who actually supplied her with the necessaries, and to receive satisfaction to the amount proved to have been delivered (z). But if the wife elope and live with another man, the husband's assent will be no longer implied, and he will not even be liable to pay for her necessaries (a).

Mr. Perkins observes, that if a single woman be executrix, and afterwards marries, and all the debts of the testator are satisfied, she may

(y) 43 Edw. III. 33. Sid. 109. Mod. 128. Keb. 69, 80, 87.  
Skin. 349. Salk. 118.

(z) Pre. Ch. 502. 1 P. Will. 482.

(a) Stra. 647. 6 Term. Rep. K. B. 603. 2 Ventr. 155.

pay the legacies out of the assets in despite of her husband. But that if she proceed to discharge such legacies before all the debts are paid, such discharges will be void, and the husband may have an action of trespass, for the act of the wife would amount to a *devastavit*, if the remaining personal estate fell short in satisfying the testator's debts (b). The reason is apparent from the distinction before made in this chapter; for in the first case, the wife is allowed to act as executrix, and her mode of administering is proper, and cannot injure the husband; but in the second, if her acts were permitted to be good, the effect would be, to involve the husband in the consequences of a *devastavit*, without his interfering in or assenting to the administration; for the husband being chargeable with all the debts of the wife, the *devastavit* as one, would be a demand which he would be obliged to satisfy.

We must notice, however, that the husband is liable only to pay his wife's debts during the coverture (c); therefore, if they remain unsatisfied at her death, he will not be obliged either at law or in equity, to answer such demands to a greater extent than the amount of her estate,

(b) *Perk.* Sect. 7.

(c) *Br. Tit. (Dette)* pl. 48. 3 *Mod.* 186. 10 *Mod.* 161. *Cro.* Jac. 257. 1 *Roll. Abr.* 351. (F). pl. 5.

which he may receive after the happening of that event (*d*). A distinction seems to prevail on this subject, between such part of the wife's estate as the husband receives *qua maritus*, and such portion of it as does not belong to him in that character; the principle is this, in the first case, as the husband is liable to his wife's debts during the coverture, whether he receive any fortune with her or not, if he happen to acquire one, it is but reasonable, that if her debts contracted *dum sola* are not recovered in her life-time, the husband should be at liberty to take advantage of that circumstance, and not be obliged to pay them out of the fortune received with her: but in the second, as he cannot recover the wife's property which is outstanding at the period of her death, except in the character of her *administrator*, it will be assets at law to pay her debts, and he will be obliged to apply them for that purpose (*e*).

It is a consequence of the blended and indissoluble character of husband and wife, and for the safety of the former, that the latter is disabled from suing, or being impleaded in any

(*d*) 2 Vern. 118. Pre. Ch. 255.

(*e*) 1 Eq. Ca. Abr. 60. 1 P. Will. 466. Ca. Temp. Talb. 173. Sel. Ca. Ch. 19. 3 P. Will. 409.

action or suit, without the husband (*f*). And in *Beard v. Webb* in error from the *King's Bench*, it was determined in the reversal of that Court's opinion, that a married woman sole-trader in the City of London could not sue without her husband in the courts at *Westminster*; and *Lord Eldon* Chief Justice of the Court of *Common Pleas* observed, in delivering the opinion of the Court of *Exchequer Chamber*, that if the law were so, he thought the converse necessarily followed, that she was not liable to be sued there without her husband (*g*). Exceptions, indeed, have been allowed to the generality of the rule, but they are only such as necessity gave rise to, viz. the *abjuration* or *exile* of the husband, and in cases of *divorce* (*h*). Another exception has lately been attempted to be added to the former, in instances where the wife lives apart from her husband under a *deed or articles of separation*, by which she has a provision independent of him. This exception seems to have been countenanced by the decision in (*i*) *Corbett v. Poelnitz*, but the principle upon which that case was determined, has been over-ruled by the decision of the twelve judges

(*f*) 1 *Salk.* 116. 2 *Vern.* 104. 2 *Black. Rep.* 1079. 4 *Term.*

*Rep. K. B.* 361, 766. 5 *Term. Rep. K. B.* 679.

(*g*) 2 *Bosanq.* and *Fuller's Rep. C. P.* 93, 108.

(*h*) *Co. Litt.* 132. b. 133. a. (*i*) 1 *Term. Rep. K. B.* 5.

in a late case of *Marshall v. Rutton* (*k*), by which it was determined, that a married woman living apart from her husband under a deed of separation, and having a separate maintenance, could neither contract nor be impleaded as a *feme-sole*. See also the authorities referred to in the notes (*l*).

This kind of separation *in pais*, is the offspring of late years, and totally unknown to the common law; and it is worthy of notice that in this, as in other innovations on that law, the legal acknowledgment of this species of divorce seems to have introduced considerable difficulties. Thus it has been adjudged, that although a wife so separated from her husband, cannot oblige herself to answer *personally* for engagements made during the separation, yet they will be allowed to affect her separate estate in the hands of her *trustees*, when it is *specifically* pledged or assigned (*m*). And it has also been determined, that the making of such settlement and the acceptance of it by the wife, will exempt the husband from her future debts (*n*); should a case therefore happen, in which the wife exhausted

(*k*) 8 Term. Rep. K. B. 545.

(*l*) 2 Black. Rep. 1195. 1 Hen. Black. Rep. C. P. 346. 1 Ves. Jun. C. C. 277.

(*m*) 1 Ves. 163, 517. 1 Bro. C. C. 16. 1 Ves. Jun. 189.

(*n*) 1 Ves. Jun. 277.

the whole of her separate estate, and became destitute of support, she must become a burden to the place of her settlement, although the husband may be living in affluence, and well able to support her.

If the creditors of the wife be *general* only, having no specific lien upon any part of her separate estate, they cannot subject it in equity to the payment of their demands (o). And it was determined in *Hyde v. Price* (p) at the Rolls, that the grant of an annuity by a married woman living apart from her husband, out of the dividends of stock vested in trustees by deed of separation, and expressed to be for her maintenance, could not be supported from the nature of the transaction and the intention of the parties, which were, that the wife should not have the power of charging or alienating the provision in such manner as to defeat the settlement, and leave herself destitute.

As this species of divorce is unknown to the common law, and the Ecclesiastical Court according to the jurisdiction of this country, has *exclusive* cognizance of the rights and duties arising from the state of marriage, a Court of Equity cannot controul the common law, nor infringe upon the separate jurisdiction of the

(o) 2 Ves. Jun. 150. (p) 3 Ves. Jun. 437.

Ecclesiastical Court, in admitting a suit between husband and wife to enforce the performance of a mere personal contract, entered into between them alone to live apart.

The instances in which a Court of Equity has interfered, may be classed under three heads; first, where the *interests of third persons* have occurred, as where they have covenanted or agreed to indemnify the husband against the wife's debts (*q*); for in those cases there was a good consideration between persons able to contract. Secondly, *upon an accession of a fortune to the wife after the separation took place*, and application to the court, that a provision should be made for her out of the property, under those circumstances; for it would be very hard that the wife, on whose account the fortune came, should lose, and the husband gain the whole benefit of it (*r*). And thirdly, when the *property is merely equitable*, and cannot be recovered at law (*s*). If, however, the wife return to and cohabit with her husband, and she afterwards endeavours to enforce the contract of separation, she will not be allowed to do so; for it seems that the subsequent cohabitation completely avoided

(*q*) 2 Vern. 386. Pre. Ch. 497. (*r*) 2 Ves. Jun. 191.

(*s*) 3 P. Will. 269. 5 Ed. and the Cases in the Notes. 3 Ves. Jun. 352, 359.

the prior contract (*t*). But the wife living apart from her husband under deed of separation cannot, according to the decision in *Rex v. Mead* (*u*), be compelled by the husband to return to, and live with him.

In equity, the wife may be a plaintiff or defendant without the concurrence of her husband, as in cases where she prays relief against him (*x*); but in all cases of the wife being plaintiff, she must proceed under the care and protection of her *prochein amis*. She will be permitted to *defend* a suit separately, when her interest in the subject of litigation is contradictory to the husband's claims (*y*), or when she disapproves of his intended defence (*z*); but she must first obtain the leave of the court for the purpose, except when the husband commences a suit against her, and then she may answer separately without order (*a*).

Another consequence of the union of person in husband and wife is, that the husband cannot at law covenant with or grant any thing to the wife; for the grant supposes her existence separate from him, and the covenant amounts

(*t*) 3 Bro. C. C. 619. in a Note.

(*u*) 1 Burr. 542.

(*x*) Pre. Ch. 275. 1 Ves. Jun. 21.

(*y*) Pre. Ch. 429.

(*z*) 2 Atk. 50.

(*a*) 3 Atk. 478.

only to a covenant with himself (*b*); and, therefore, it is also generally true, that all compacts made between the husband and wife, are avoided by the intermarriage. The husband may, however, grant to, and covenant with, the wife through the medium of trustees; accordingly, a feoffment, a release, or surrender, of freehold or copyhold lands to another for the wife's use, is valid (*c*). A devise to her, is also good, because that does not take effect till after the coverture (*d*); for the same reason, a *donation mortis causa* to the wife, will be supported (*e*). And it is said, that by the custom of a particular place, as of *York*, the wife may take by *immediate* conveyance from her husband (*f*).

Although, in general, the compacts of husband and wife prior to the marriage are annulled by it at law, yet this is the rule of law only, and does not even there extend to contracts which, from their nature, can give no right of action during the coverture. In order to exemplify this, we may observe, if husband obligor marry the obligee, the debt and obligation are cancelled by the intermarriage (*g*), for the wife cannot at law sue her husband; and if he were

(*b*) Co. Litt. 112. 1 Black. Com. 442. 2 Atk. 72.

(*c*) Co. Litt. 112. a. (*d*) Litt. sect. 168.

(*e*) 1 P. Will. 441.

(*f*) Fitz. Prescription, 61. Bro. Custom. 56.

(*g*) Cro. Car. 551. 1 Lord Raym. 515.

to pay the debt, it would be a fruitless payment, as he might, the next moment, receive the money for his own use. But if the husband, before marriage, give a bond to his intended wife, with a condition to avoid it, *if he left her a certain sum of money at his death*, the engagement would not be dissolved by the intermarriage, for it never ripened into a duty in the life-time of the husband, and could not have been released by him (h).

In equity (as we have seen) the union of person in husband and wife, is not permitted to deprive them of the privilege of impleading each other, when their rights are contradictory, or when either refuse to perform to the other his or her marriage-articles, or other stipulations made in contemplation of the marriage. Hence, although a bond, given by either of them to the other in contemplation of the marriage, be cancelled at law, on the solemnization of it, the bond will nevertheless be set up in equity as evidence of the agreement of the parties; and it was justly observed by Lord Macclesfield in *Cannel v. Buckle* (i), "That it was unreasonable, the intermarriage, upon which the bond alone was to take effect, should itself be a de-

(b) Cro. Jac. 571. Cro. Car. 376. Hob. 216. 5 Term. Rep.

K. B. 381.

(i) 2. P. Will. 244.

struction of the bond, and the foundation of the notion was, that in law the husband and wife being one person, the husband could not sue the wife, whereas in equity, it was constant experience, that the husband might sue the wife, or the wife the husband." See the cases referred to in the notes (k).

Although the wife has always been allowed to enjoy property separate from, and independent of, her husband during the marriage, it does not appear to have been settled before the year 1725, that she was capable of taking any interest in real or personal estate, without the interposition of trustees; but in that year it was determined at the *Rolls* (l), that an immediate devise to a married woman, for her separate use, converted the husband into a trustee for her benefit, his honour observing, there was no difference between a trust *expressly* created, and one raised *by operation of law*.

It has been shewn before, that the wife living under articles or deed of separation, apart from her husband, is considered a *feme-sole*, and may dispose of her separate estate without his concurrence, except in cases, where sufficient appears from the instrument to controul

(k) 2 Atk. 98. 2 Vern. 480. Pre. Ch. 41.

(l) 2 P. Will. 316.

the established rule. The law is the same, when personal estate is left or given to her separate use, and disposition, during the coverture, and she may alien, pledge, or bequeath it, without the assent of her husband (*m*). And in *Compton v. Collinson* (*n*) it was decided, that a married woman seized of *copyhold lands* to her separate use, and living apart from her husband, was competent to *surrender* such lands without the husband's concurrence, he having covenanted, that his wife should enjoy to her own use, all the real and personal estate of her father (whose estate the copyholds were), as well as any other real estate that might come to her in any other manner during the coverture; and that he would join in levying a fine, suffering a recovery, or *making a surrender of such estates*, and in limiting the same to such uses as she should appoint. The principle of the decision seems to have been this; that as the wife, and not the husband, was tenant of the copyholds, which could be forfeited or surrendered only by her acts, and as the authority that the husband acquired by his marital rights to direct and controul her acts, was by his covenant, annulled or suspended, there could be no ob-

(*m*) *Pre. Ch.* 44. 1 *Ves.* 303, 518. 2 *Ves.* 191. 1 *Bro. C. C.* 16.

2 *P. Will.* 624. 2 *Atk.* 49. 1 *Burr.* 431. *Cro. Car.* 219.  
*Dougl.* 707. 2 *Atk.* 48. 3 *Atk.* 160.

(*n*) 1 *H. Black. Rep. C. P.* 334.

jection to the validity of an act passed in the court of the manor between her and the lord.

This doctrine, however, seems to admit of qualification, in regard to the wife's transactions and engagements with the husband, relative to her separate property; for the law, with a view to guard against the effects of that influence which the husband is reasonably presumed to have over the wife, will not, perhaps, consider her as a *feme-sole* in all respects, in relation to her husband. Such appears to have been the opinion of *Lord Loughborough* in *Milnes v. Busk* (o), wherein he refers to *Pawlet v. Delaval* (p), the only case he had been able to find where the question arose directly between husband and wife, and ascribes the determination of it to particular circumstances; and said, it was clear from *Lord Hardwicke's* reasoning, and the pains he took to collect all the circumstances, he did not entertain an idea, that in the common case, a married woman having separate property, could to all intents and purposes, be placed upon the same footing as a *feme-sole*. Perhaps the subject may be considered thus: In transactions between the husband and wife, relative to the separate estate of the latter, she will *prima facie*, be viewed in the light of a

(o) 2 Ves. Jun. C.C. 498.

(p) 2 Ves. 663.

*feme-sole*, and as such be competent to dispose of it to him or for his use, subject, however, to proof of fraud or undue influence used on the part of the husband. To this effect *Lord Hardwicke* expressed himself in *Grigby v. Cox* (*q*), which is countenanced by the practice of the Court of Chancery in cases of this kind; for if the trustees of the wife oblige the party to apply to that court, it is said that a deed made between husband and wife concerning her separate estate, will not be established without the actual presence of the wife in court (*r*). It is obvious, that this reasoning does not apply to instances where the husband gives part of his personal estate to the wife; so that his gifts to her will be supported in equity, although no property in the things given passed to the wife at law by the delivery (*s*). But these gifts are liable to the demands of the husband's creditors; and in *Beard v. Beard* (*t*), *Lord Hardwicke* is reported to have said, that the court would not suffer the wife to have the *whole* of the husband's estate while he is living, for it was not in the nature of a provision, which was all the wife was intitled to.

(*q*) 1 Ves. 518. (*r*) 2 Ves. Jun. C. C. 500.

(*s*) 1 Atk. 270. 3 P. Will. 338, 359. Bunn. 205. 1 Vern. 244.

(*t*) 3 Atk. 72.

It does not appear to have been judicially settled prior to the case of *Fettiplace v. Gorges* (u), that the wife might dispose of property given to her separate use by testament, when no power to make such disposition was expressly limited by the donor; but that case seems to have established this proposition, that the wife's personality when enjoyed by her separately, must be attended with all its incidents, and the *jus disponendi* is one of them. If, however, the instrument which gives the wife separate property, also enable her expressly by a particular mode to dispose of it, she must pursue the power, or the disposition will not be supported. Accordingly, if the interest or dividends of personal estate be given to the wife's separate use, with a power of appointing the *capital* by *will*, a disposition of it by *deed* will be void (x). But the trustees appointed for the wife's benefit, need not join in the appointment, unless it be expressly required by the power (y).

If the wife permit the husband to receive the produce of her *separate* estate, without calling for an account and payment of it during their joint lives, an inference arises, that she intended

(u) 3 Bro. C. C. 8.

(x) 4 Bro. C. C. 483. 1 Ves. Jun. C. C. 189, 194.

(y) 1 Ves. 518. 1 Ves. Jun. 193.

to make him a present of it in consideration of his maintaining and supporting her; therefore the wife, if she survive him, or her representatives, if she die before him, will not be intitled to charge his estate, in respect of such receipt, for more than the amount of *one year's* arrears (z). This, however, is an inference of law only, and may be repelled by proof of a different intention, as that the wife demanded of her husband an account and payment of the money received by him in respect of her separate estate, and that he promised to pay it (a). And if the wife, having no separate property, be permitted by her husband, to receive part of the annual produce of his estate, which is not accounted for and paid to him during their joint-lives, his representatives will not be intitled to carry the account farther back than for *one year*, immediately preceding the husband's death (b), except under particular circumstances.

Previous to the case of *Wright v. Cadogan* (c), it seems to have been an unsettled question, whether the husband and wife by a mere agreement before marriage, that the wife might dis-

(z) 2 P. Will. 82, 340. 3 P. Will. 355. 2 Ves. 7. 4 Bro. C. C. 326. 2 Ves. Jun. 716.

(a) 1 Eq. Ca. Abr. 140. pl. 7. 1 Atk. 269.

(b) 2 Ves. 190.

(c) 6 Bro. Parl. Ca. 156.

pose of her real estate by will during the cōver-ture, could enable her to defeat the right of her heir after her death, by a will made in con-sequence of such agreement, the legal estate not being vested in trustees, but descend-ing to the heir; and it was doubted whether a Court of Equity could, upon any principle, af-fect the conscience of the heir and oblige him to perform the agreement, as the will of the wife was void from the disability of cōver-ture, and the heir no party to the agreement (*d*). But that case has removed the doubt by determining, that a Court of Equity will con-sider the heir a trustee, and oblige him to make a conveyance to the party in whose favour such agreement was made; for the wife might have compelled her husband after the marriage, to join with her in a fine to settle the estate pur-suant to the agreement, in which case the heir would have been bound, and her not doing so will not prejudice her devisee (*e*).

We must notice, however, that although trans-actions between husband and wife after mar-riage, will bind him, and all persons claiming under him as *volunteers*, they will not be sup-ported against purchasers and creditors. Thus if the husband make provision for his wife by

(*d*) 2 Ves. 191.

(*e*) 2 Term. Rep. K. B. 684. Ambl. 565.

articles of separation, it cannot be supported against creditors (*f*); but if a person covenant with the husband to indemnify him against the wife's debts, the articles will be valid, and not liable to be defeated by the creditors of the husband (*g*); for the indemnity of the husband is a consideration sufficient to take the transaction out of the statutes of Elizabeth (*h*).

With respect to the validity of *settlements* made *after* marriage, upon the wife and children, in regard to strangers, the following distinctions may be collected from the cases.

If the husband be not indebted at the time of the settlement, or immediately afterwards, so as no intention can be inferred from the transaction that it was intended to defraud creditors, the settlement will be good against subsequent creditors (*i*). *Secus*, if he were indebted at the time (*k*), or if he limited to himself an *interest* in the deed, which would explain the transaction and afford an inference, that the settlement was not in truth to provide for the wife and chil-

(*f*) 2 Atk. 512.      (*g*) 2 Bro. C. C. 90 and 93. in Notes.

(*h*) 13 Eliz. cap. 5. 27 Eliz. cap. 4.

(*i*) 2 Ves. 1, 11. 1 Atk. 93. 2 Atk. 520. 3 Atk. 410.

(*k*) 1 Ves. 27. 2 Ves. 1, 11. 2 Atk. 481. 3 Ves. Jun. C. C. 617. 3 Rep. 80, b.

dren, but to deceive creditors (*l*): But if the settlement be made in consideration of the wife's fortune, or in consequence of a casual increase to it, the settlement would be good against creditors, and also against subsequent purchasers (*m*). If the husband continue in possession of the property after the execution of the settlement, in contradiction to it, this will avoid the transaction; for by doing so, he is permitted to deceive strangers, and induce them to advance him money on the credit of the false possession he is allowed to retain (*n*). And if the settlement contain a power of revocation, or if it comprise the *whole* of the husband's property, it will be considered as tinctured with fraud, and therefore void (*o*).

A distinction has been made between creditors and purchasers, in the construction of the two statutes of Elizabeth before referred to. We have seen, that a *bonâ fide* settlement made *after* the marriage, will be good against the subsequent *creditors* of the husband; but it has been decided, that such a settlement would not be supported against subsequent *purchasers*, al-

(*l*) 2 Atk. 477, 600.

(*m*) Pre. Ch. 22. 1 Atk. 13, 188. 2 Atk. 444, 477. Talb. 64. 2 Ves. 16, 305. Ambl. 121. Cowp. 432.

(*n*) 3 Rep. 81. a. 2 Bulst. 218. (*o*) 2 Vern. 510. 3 Atk. 72.

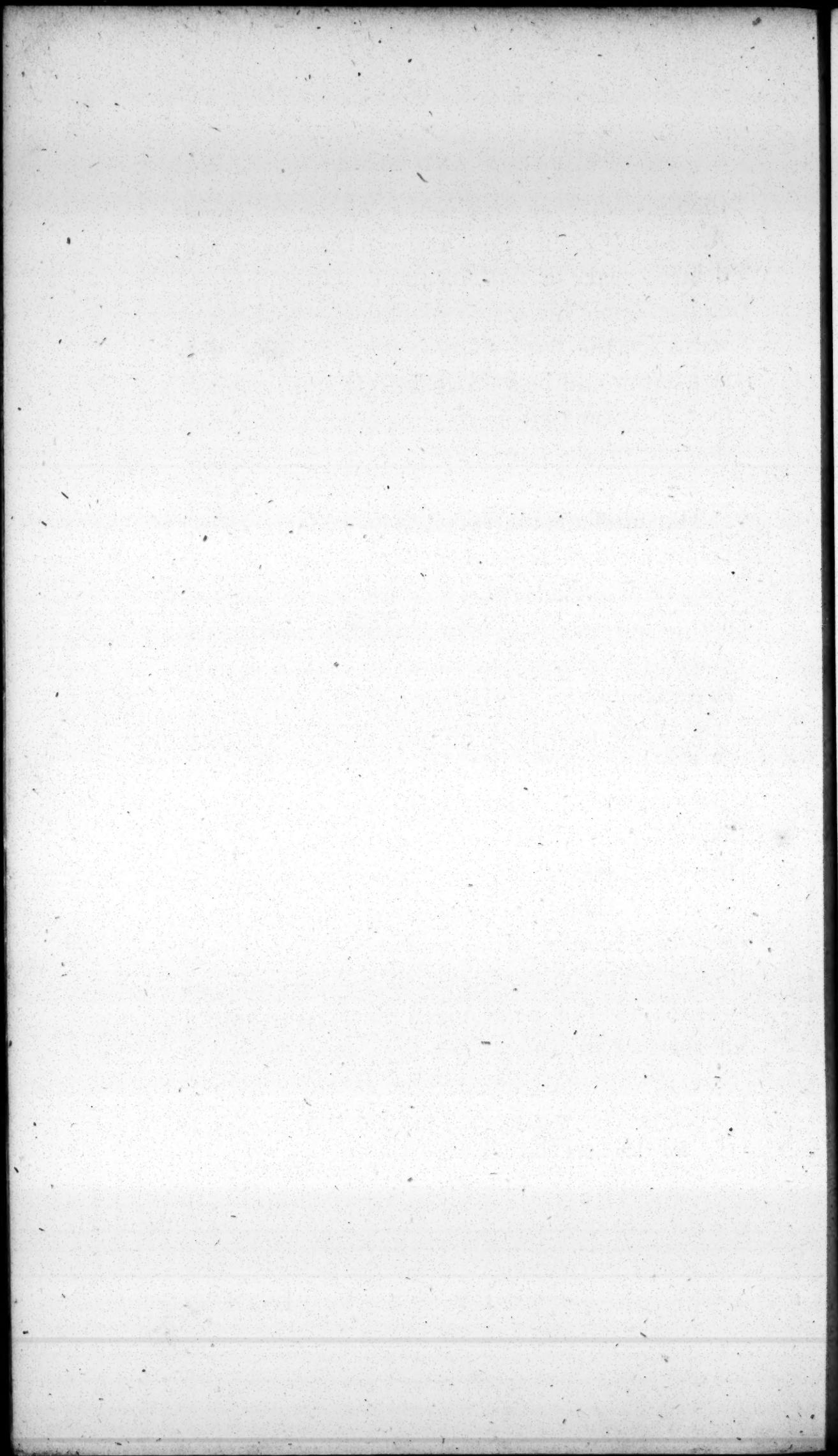
though

though they even had notice of the settlement. Accordingly, if the husband not being indebted, make a settlement of part of his real estates upon his wife and children, and afterwards sell the same estates to *B.*, the prior settlement would be void against *B.*, although it should appear that he was acquainted with it at the time of the purchase (*q*).

The purchasers intended to be relieved against voluntary and fraudulent settlements, are not only those persons who give *money* for the property, but also those who acquire it upon a *good* and fair consideration, as of *blood*, or of *natural love and affection*. The sale and purchase, however, must be a *bonâ fide* transaction, or a court of law will not set aside the prior voluntary settlement. Thus if the consideration of the subsequent conveyance appear to be considerably less than the real value of the estate before settled, and that the husband and the pretended purchaser conspired to defeat the settlement, this will not be considered such a purchase, as was intended to be provided for by the statute of the 27 Eliz. cap. 4. (*r*).

(*q*) Cro. Jac. 158. 2 Ves. 10, 11. 2 Bro. C. C. 148. Cowp. 278.  
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